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T H E
JUSTICE of the P E A C E,

A N D
P A R I S H O F F I C E R.

BY RICHARD BURN, L.L.D.

Chancellor of the Diocese of CARLISLE, and one
of his MAJESTY'S Justices of the Peace for the
County of WESTMORLAND.

The T E N T H E D I T I O N.

In F O U R V O L U M E S.

V O L. I.

L O N D O N :

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to the King's most excellent Majesty ;

For A. MILLAR, in the Strand.

M.DCC.LXVI.

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John Adams

T O

Sir JAMES LOWTHER

O F

LOWTHER, Baronet,

T HIS Book is humbly dedicated,

By the author

RI. BURN.

ADAMS/L-1.2

THE
P R E F A C E
TO THE
FIRST EDITION.

THE author proposeth in this book to render the laws relating to the subjects it treats of, a little more intelligible than hath hitherto been done.

The method he makes use of is various.

The first thing regarded is the order of *time*. Thus in the Poor laws; first is set forth the appointment of *overseers*; next the several branches of their duty, in finding *settlements* for the poor—in *removing* them to such settlements—in making *rates* for their relief—in *relieving* and otherwise ordering them—and last of all, in *accounting* at the expiration of their office.—Then again, in treating of *settlements*, it occurs, to consider distinctly, and as near to the said order as may be, ten different

rent kinds of settlements——by *birth*——by the *parents settlement*——by *apprenticeship*——by *service*——by *marriage*——by *inhabiting forty days after notice*——by paying *parish rates*——by serving a *parish office*——by *renting 10l. a year*——and by a person's *own estate*.——In like manner, in treating of the *rates*, first is set forth the course of *laying the assessment*——then the *allowance* thereof by the justices——*publishing* the same in the church——*appeal* against the rates at the sessions——levying the same by *distress*——and finally, *commitment* where no distress can be had.

Thus to exhibit another instance——In the article of the *Woollen manufacture*, which makes up a considerable part of the justice of the peace his duty, and of the officers subordinate to him, there is such a number and variety of statutes, that authors are generally overwhelmed with them. To avoid which perplexity, the laws are here digested in order, according to the natural progress of that business; from the *shearing of the sheep*, to the *exportation of the wool manufactured*; under the several heads of *winding of wool* by the shearer——laws to prevent its *exportation*——*working of cloth*——*fulling*——*measuring*——*dying*——*stretching*——*dressing*——*exporting*.

Where there is no priority in point of time; the next method is that of Lord Coke, to frame a definition which takes in the whole subject, and then explain the several parts of such definition in their order. Thus *Grand larceny* is defined to be, *A felonious and fraudulent taking*
and

and carrying away by any person of the mere personal goods of another, above the value of 12d. In the handling of which, the several branches of the definition are explained in the order as they stand: *viz. A felonious and fraudulent taking—and carrying away—by any person—of the mere personal goods—of another—above the value of 12d.* Under which heads the general learning relating to that whole title is comprehended.

The like method is pursued in treating of the *commission of the peace*, the form of an *indictment*, the form of an *order of removal*, and other articles.

In general, it is provided, that one thing shall clear the way for another, and the subsequent paragraphs explain the preceding.

Under the influence of which conduct, the author hath attempted to bring together under one general title, divers articles relating to the same subject, which in the common books are broken and detached under various separate titles; hoping thereby, that what hath hitherto been thought introductory of confusion, may tend to render the subject more perspicuous, in exhibiting the whole under one comprehensive view. Thus the laws relating to the *game*, which are above forty in number, and are intersped in the common books under about thirteen different titles, are here digested under one general title *Game*, to which the reader shall have recourse for the knowledge of whatsoever belongeth to that subject. For example, if any person would be satisfied, what penalty the law hath provided

for *tracing hares in the snow*; by recurring to the general title concerning the game, he will find the game distinguished into three kinds, the *four-footed game*, the *winged game*, and the *game of fish*: The *four-footed game*, are distributed into the several species of *deer*, *hares*, and *conies*; under which head concerning *hares*, he will readily find what is desired. In like manner, the *winged game* are subdivided into several branches, concerning *hawks* and *hawking*——*swans*——*partridges* and *pheasants*——*pigeons*——*wild ducks*, *wild geese*, and *other water fowl*——*grouse* or *moor game*——*herons*——and *other fowl*; each of which have their peculiar laws.

In these large comprehensive titles, care is likewise taken, to be as particular as may be without injuring the connexion in the statutes, by inserting the whole law by itself, relating to each separate article. The benefit of which will appear by the following instance: If a person would know, what number of horses or beasts in a cart or waggon are allowed by the statutes for the preservation of the roads; let him take what treatise at present he pleases concerning the highways, he must read over the whole, before he shall be sure that he hath found all which the law hath enacted concerning the same; and such is often the inaccuracy and confusion, that when he hath perused the whole, perhaps he may be still to seek: For as to this instance before us, there have been regulations made concerning the same, by ten * diffe-

* Since the first publication of this preface, other five have been added.

rent acts of parliament, at very different times. Before he can have any competent knowledge thereof, he must lay all these ten acts together; and when he shall have done this, he will find amongst them so many repeals, and revivals, and explanations and amendments, that it will even then be no easy matter to conclude with certainty how the law doth stand as to that article. To spare the reader all which trouble, the author hath in this and all other the like instances, laid the whole law together relating thereunto, or at least all that hath occurred to him, or which he hath thought it material to insert. So that the reader may receive satisfaction in a very small compass, as to what he shall be inquiring about; or at least he may be satisfied in this, that if he doth not find it there, he need not seek for it elsewhere in the book.

And by this method of bringing together into one general title, all those separate distinct titles, which have a mutual relation to and dependance upon each other, the author hath avoided one great inconvenience, of referring the reader from one title to another, and from that other back again to the first, and (which is not unusual in books of the like kind) perhaps losing the thing to be treated of betwixt them.

Upon which account also, where one law occurreth under two different titles, it is usual with him to insert the same under both those titles; that so the reader's attention may not be interrupted, by sending him to search other titles

tles, and from those perhaps others again, which have no principal relation to the matter he hath in hand.

Also, upon another account, he hath sometimes made use of more words than otherwise he would have done, namely to avoid the frequent repetition of the term *&c.*; which is a vague expression, and apt to create an uneasiness in the reader's mind, for that he cannot be satisfied from thence, how much, or how little is intended to be understood.

He hath also been somewhat large in the matter of *precedents* under divers titles; and hath endeavoured to bring them much nearer to the statutes, upon which they ought to be formed, than usually hath been done.

For all which enlargements, he hath the more space allowed to him, for that he hath not thought it necessary (as others have done) to take up near one fourth part of the book, by inserting *Blackerby's* justice at the end of it, by way of index; hoping that the method he hath pursued will render every thing of that kind impertinent and useless.

The materials which the author hath made use of, are chiefly of four kinds——The *statutes* at large——the several treatises concerning the *pleas of the crown*——the *reports* of cases adjudged in the court of king's bench——and the books concerning the *office of a justice of the peace*.

As to the *statutes* at large, or acts of parliament; the author hath not thought himself at liberty, as Mr. *Dalton* and others have done, to deliver the import thereof in his own words; but hath constantly abridged the act, in the words of the act itself, leaving out as little as possible which may seem any way material. And to each distinct clause, he hath annexed the interpretation thereof, where the same hath been determined in the court of king's bench, or expounded by other good authority.

The treatises concerning the *pleas of the crown*, are those of *Stamford*, *Coke*, *Hale*, and *Hawkins*. Of the first of these, the author hath made little use, further than as he is adopted by the other three. As to which three great authorities, where the law hath been declared by Lord *Coke*, and not controverted by any other, nor altered since his time by any act of parliament, or judicial determination, the author hath given to him the preference. And where any of these differeth from the other, he hath noted the difference.

In citing of Mr. *Hawkins*, he hath not thought it allowable, as is usual with others, to omit the several degrees of caution and assent, with which he delivereth his opinion; as, *it seemeth*, or *it hath been said by some*, or *it seemeth to be the better opinion*, or *it seemeth to be agreed*, and the like; which are by no means arbitrary words without much meaning, but are inserted by him with the utmost deliberation and judgment.

As

As to the books of *reports*; where the cases therein have been considered by Mr. *Hawkins*, and the other learned persons before mentioned, the author hath judged it very proper to leave the matter there as settled by them. As to the rest, he hath by no means thought himself of ability to proceed in Mr. *Hawkins's* manner, by laying together all the reports on the same subject, and thereupon extracting an opinion out of the whole; but hath inserted the same at large, or what he hath thought most material thereof, and left the determination thereupon to the reader's better judgment.

And here it may be requisite, that the reader be admonished, not to expect that the book shall be more perfect, than the materials of which it is composed. All the books of reports are not of equal authority. Many of them are only notes that had been taken for gentlemens own private use; which doubtless, would have been much more perfect, had they intended them for publication. For these, or any other, the author himself voucheth not: And, as he doth not add to their credit, so he doth not detract from it; but leaveth every author, (as he needs must) to answer for himself. For he hath made it an invariable rule, upon all occasions, to cite his authorities, what such soever they be; and, in all material instances, in the very words of the original authors: that so, what may be of good authority in it self, shall not be rendred less so by his handling of it. And where no authority is alledged, he desires the reader will look upon it as such, namely, as having no authority; the same being

ing nothing else but the author's own private observations, which are submitted to every reader's judgment, to approve or reject as he shall see cause.

The books of authority concerning the *office of a justice of the peace*, are those of *Fitzherbert*, *Crompton*, *Lambard*, and *Dalton*; the last of which was published in the reign of king *James* the first: since which time, no book under that title hath been allowed as sufficiently authentick. And even the additions which have been made to *Dalton* since his death, seem to have no better claim to an uncontrollable authority, than other collections which have not obtained it. And *Dalton* himself is much injured in the modern editions, in like manner as was observed before of Mr. *Hawkins*, by delivering that as absolute, which Mr. *Dalton* published under the several degrees of assent or doubtfulness before mentioned; and which the author, in justice to Mr. *Dalton*, hath restored.

Where *Dalton* hath adopted *Lambard*, *Crompton*, and *Fitzherbert* (which he doth most frequently in their own words) the author hath thought it sufficient to cite *Dalton's* single authority. And generally, in all other cases, where authors are agreed, he hath judged it unnecessary to alledge more than one or two good vouchers.

Concerning the other books of this kind, which have been published since *Dalton's* time, it is unnecessary to enlarge; since of the most
of

of them the author hath made no use, and of the rest very sparingly; and he will not seek to recommend his own book, by finding fault with others before him.

Orton, Westmorland,

Sep. 29. 1754.

Advertisement concerning the SECOND EDITION.

THREE things herein the author hath chiefly attended to: 1. To continue the statutes to this present time. 2. To authenticate divers cases of slender authority, by the sanction of Sir *John Strange*; whose reports of cases adjudged during the reigns of the late king and of his present majesty, have supplied in some measure the deficiency which was in that part of the law before. 3. To take somewhat a larger scope in investigating matters of antiquity; herein presuming to differ from Lord *Coke* and other authorities of the law: being led therein by his learned and ingenious friend Dr. *Morton* of *Leicester-fields* *; to whom upon the like account he expressed his acknowledgments in the postscript to the former edition.

Sep. 29. 1755.

* Now secretary of the royal society, keeper of the manuscripts and medals in the *British Museum*, and physician to the foundling hospital

Advertisement concerning the THIRD
EDITION.

THE distance of time from the date of the second edition renders this third edition not susceptible of much alteration by the statutes since enacted: Those which have been enacted (which was, during the time that the book was in the press) are inserted in an appendix. And some further improvements have been attempted. For in a matter of so flux a nature as the law, it is not to be imagined that any edition, however tolerable for the time, should long continue so, without submitting to alterations according to times and circumstances.

Apr. 26. 1756.

Advertisement concerning the FOURTH
EDITION.

AS the two first editions of this book, in two volumes in octavo, were deemed to be printed in too small a letter; and the third edition, in folio, was intended chiefly for libraries and domestick use: it is now judged proper to print the same in three volumes in octavo, in somewhat a larger letter than the two first editions, and in a more portable compass than the third. And herein space is allowed for certain enlargements, which indeed were retrenched at first only to retain
the

the two volumes within competent dimensions. So that, in effect, the book is now as the author first intended it; and is continued down to this present date.

Dec. 10. 1756.

Advertisement concerning the FIFTH EDITION.

THE author thinketh it needful only to say, that this edition cometh down to the end of the statutes of the thirtieth year of the reign of king *George* the second.

Sep. 29. 1757.

Advertisement concerning the SIXTH EDITION.

THIS edition differeth in nothing which is material, from the fifth edition in folio.

Apr. 25. 1758.

Adver-

Advertisement concerning the SEVENTH EDITION.

SINCE the publication of the sixth edition, there have been many alterations in the law, by acts passed during the four last sessions of parliament. Also divers new cases have arisen and been determined in the courts of *Westminster* hall; of which the author hath endeavoured to procure some account. Many useful hints have likewise been suggested by gentlemen acting in the commission of the peace, or practising in the law; unto whom the author taketh this opportunity to render his humblest acknowledgments.

In like manner, divers additions or alterations have occurred from time to time to the author himself. Upon all which accounts he thinketh it needful to make an apology to the purchasers of the former editions. It hath indeed at several times been his intention to publish the alterations separate, but upon trial he hath always found it impracticable. Particularly in this present edition, besides several titles which were necessary to be wholly new framed, there are so many insertions in other titles, occasioned by above forty acts of parliament, that to disintangle the same would be extremely difficult, and when effected would equal the size of one fifth part of the book.

Jan. 1. 1762.

Advertifement concerning the EIGHTH
EDITION.

THIS edition is brought down to the end of the statutes of the third year of the reign of king *George* the third.

Nov. 22. 1763.

Advertifement concerning the NINTH
EDITION.

THIS edition differeth in nothing from the eighth edition in quarto.

Mar. 25. 1764.

Advertifement concerning this TENTH
EDITION.

MANY and great alterations have been necessary to be made by reason of the statutes of the two last sessions of parliament; particularly in the large title concerning the *excise*; as also in the titles *alehouses*, *game*, *highways*, *militia*, *stamps*, *woollen manufacture*, and many others. And the publick having been favoured with a volume of reports, by the very judicious and accurate master of the crown office, the author hath been enabled from thence
to

to rectify several imperfect reports of cases, and to add others of which he had not before been able to procure any account.—From the continuance of that worthy gentleman's publick communications, much may be hoped for in time coming.

Mar. 25. 1766.

INTRODUCTION,

Consisting of TWO PARTS;

CONTAINING

I. *Certain abbreviations made use of in this work.*

II. *Some general rules to be observed, in the construction of statutes or acts of parliament.*

I. *Certain abbreviations made use of in this work.*

IN order to keep the book within a reasonable compass, the following *abbreviations* are made use of.

1. The word *justice* is always to be understood to mean *justice of the peace*, when not otherwise expressed. Justice.

2. The words *one justice* shall always be understood to signify *one or more justices*: so that what is directed to be done by one, shall not be intended thereby to exclude others from joining with him. One justice.

3. In like manner, *two justices*, when not otherwise expressed, shall be understood to signify *two justices or more*. Two justices.

4. So also a conviction on the oath of *one witness*, shall be understood to denote *one witness or more*. One witness.

- Two witnesses. 5. And *two witnesses* shall denote *two or more witnesses*.
- Quorum. 6. (1 Q.) shall be understood to signify *one whereof is of the Quorum*.
- Majority. 7. The *justices in sessions* shall signify the said justices, or *the major part of them*.
- Sessions. 8. The word *sessions* shall denote *the general or quarter sessions*, if not otherwise expressed.
- Warrant. 9. The word *warrant* shall always signify *warrant under hand and seal*, where not expressed otherwise.
- Judge of assize. 10. Judges or justices of *assize* shall be understood to signify also those of *Nisi Prius, Oyer and Terminer, and General Gaol Delivery*.
- Mayor. 11. The word *mayor* shall always be understood to imply *bailiffs and other chief officers in corporations*.
- Constable. 12. The word *constable* shall always be understood to imply *tythingmen, borsholders, headboroughs, and other peace officers of like degree*.
- Overseer. 13. The word *overseer* shall be understood to mean *overseer of the poor*, where not expressed otherwise.
- Poor. 14. Where a penalty, or part thereof, is expressed to be given to the *poor*; that shall be always understood to denote *the poor of the parish where the offence was committed*, if not otherwise limited.
- Penalty. 15. Where a penalty is to be recovered before the justices of the peace, it is thought indispensable to insert particularly the manner of recovering the same; but where it is to be sued for in any of his majesty's courts of record at *Westminster*, it is judged not necessary to set forth the special method of procedure there: and generally, where it is expressed, that a person shall do, or not do such a thing, on pain of such a sum, without more, it shall be understood that such penalty is not recoverable before the justices of the peace, but only in the courts at *Westminster*.

16. In all cases of *distress and sale*, it shall be understood, that the *overplus* must be returned to the owner; after the sum or sums to be thereout deducted, shall be satisfied and paid. Overplus.

17. *Lands* shall be understood to stand for *lands, tenements, and hereditaments*. Lands.

18. Where *transportation* is directed for any offence, it shall always be understood, *that if the offender shall return before the time limited, he shall be guilty of felony without benefit of clergy*. Transportation.

19. In the blank spaces for the names in the precedents, instead of inserting initial letters arbitrarily, it is thought it may be some small help to the memory, that *A. O.* shall signify the offender, *A. I.* the informer, *A. W.* the witness, *J. P.* the justice of the peace, and the like. Blank spaces.

20. Also, for brevity's sake, sums of money and other numbers are usually expressed by figures, and not in words at length; but it is to be remembered, that in the forms of warrants, convictions, and other proceedings before the justices they ought to be expressed in words at length, and not in figures. Figures.

21. Where a statute is said to be in force, until such a day, month, and year, &c. it shall always be understood to imply, *and from thence to the end of the then next session of parliament*. Continuance of statutes.

22. In the statutes made in the reign of the late King *William*, it is thought not necessary upon all occasions to say *William the Third*, since there are no printed statutes in the reigns of *William the First and Second*. Citing of statutes.

Nor is it thought necessary in such statutes to add the name of Queen *Mary* to that of King *William*; but it is judged sufficient for the understanding thereof, to quote the statutes in this manner, *viz.*

1 W. sess. 2. c. 6. s. 3. to signify the statute made in the parliament holden in the first year of the reign of King *William* the third and Queen *Mary*, the second session thereof, chapter the sixth, section the third.

Citing of books,
and adjudged
cases.

23. Abbreviations in the names of books cited as authorities, or otherwise occasionally noted, consisting for the most part of some of the initial letters of the authors names, and other common distinctions, need not to be further explained.

So also the names of the terms in which the several cases were adjudged, to wit, Hilary, Easter, Trinity, and Michaelmas, are expressed by the initial letters *H. E. T.* and *M.*

II. *Some general rules to be observed in the construction of statutes, or acts of parliament.*

To avoid repeating the same observations some hundreds of times, it is thought proper to premise the following general rules to be observed, in the construction of statutes or acts of parliament.

How far an affirmative repealeth an affirmative.

1. Regularly, a statute in the affirmative doth not repeal a precedent affirmative statute. *11 Co. 61.*

But if the latter is contrary to the former, it amounteth to a repeal of the former. *L. Raym. 160.*

How far an affirmative statute altereth the common law.

2. A statute made in the affirmative, without any negative expressed or implied, doth not take away the common law; and therefore the party may waive his benefit by such statute, and take his remedy by the common law. *2 Inst. 200.*

Repealing a repealing statute.

3. By repealing of a repealing statute, the first statute is revived. *Read. Parl.*

Special power to be pursued.

4. Regularly, where an act of parliament giveth a power or interest to one person certain, by this express designation of one, all others are excluded. *11 Co. 59, 64.*

Power to administer an oath.

5. In all cases, where justices may take examinations, or other accusation or proof, tho' the statute doth not expressly set down that it shall be upon oath, yet it shall be intended that it shall be upon oath. *Dalt. c. 115.*

6. Generally, it is holden, that where a statute appoints a thing to be done by one or more justices, without giving any appeal to the sessions; there the justices in sessions may do that thing: but where an appeal is given to the sessions, the justices in sessions cannot proceed originally therein, because that method would take away the power of appealing.

In what case the sessions may execute the power given to two justices.

7. Where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, without mentioning an indictment; it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment: Yet it hath been adjudged, that if such a statute give a recovery by action of debt, bill, plaint information, *or otherwise*, it authorizes a proceeding by way of indictment. 2 *Haw.* 211.

How far an indictment will lie where another method of prosecution is appointed.

8. But every contempt of a statute is indictable, where no other punishment is limited. 1 *Haw.* 60.

Where no method of prosecution is appointed.

9. And wheresoever an act of parliament doth generally prohibit any thing, the party grieved shall not only have his action for his private relief, but the offender shall be punished at the king's suit, for the contempt of the law. 2 *Inst.* 163.

Where the defendant may be prosecuted both by the king, and the party grieved.

10. All actions, indictments, or informations, on penal statutes, for any forfeiture limited to the king, shall be brought within two years after the offence committed; if limited to the king and prosecutor, then within one year; and if it is not sued for in that one year, then the king may sue for the same within two years, after the expiration of that one year; and not otherwise. 31 *El.* c. 5. f. 5. That is to say, unless where it is otherwise directed by subsequent statutes.

In what time prosecutions shall be on penal statutes.

11. Many ancient statutes are penned in the form of charters, ordinances, commands, or prohibitions

Statutes not in the name of the whole legislature.

hibitions from the king, without mentioning the concurrence of either lords or commons; yet inasmuch as they have always been acquiesced in as unquestionably authentick, this establishes and confirms their authority, and the defect is salved by such universal reception. *Hawkins's preface to the statutes.*

Preamble.

12. The preamble or rehearsal of a statute is deemed true; and therefore good arguments may be drawn from the preamble. 1 *Inst.* 11. But the preamble shall not restrain the operation of the enacting part; as where the preamble reciteth only a particular inconvenience, this shall not hinder a subsequent enacting clause from being understood in that more general sense which the words would otherwise and of themselves import, so as to take in other inconveniences of the like kind, altho' not specified in the preamble. 8 *Mod.* 144. 1 *P. Will.* 320.

May do such a thing, how to be understood.

13. Where a statute directs the doing of a thing, for the sake of justice, or the publick good; the word *may* is the same as the word *shall*: as where the statute of the 14 C. 2. c. 12. enacts that the overseers may make a rate to reimburse the constables, this is construed they *shall*; for they are compellable so to do. 2 *Salk.* 609.

Court of record.

14. Where a statute directs a penalty to be recovered *in any court of record*; this shall not be intended of the quarter sessions, unless it be specially named in such statute; but only of the courts of record at Westminster. 6 *Co.* 19, 20. 2 *Hale's Hist.* 29, 30.

Higher courts not intended, where the inferior are first mentioned.

15. It is a general rule in the construction of statutes, that where things of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words; as where a statute speaks of indictments to be taken before justices of the peace, or *others having power to take indictments*, it shall be understood only of other inferior courts, and not of the king's bench,

or

or other courts at Westminster. 2 Co. 46. 2 Haw. 305.

16. Where a statute gives power to the justices, to require any person to do a thing, as to take the oaths, the law implicitly gives them power to issue their precept to have the body before them; for when the law granteth any thing to any one, that also is granted, without which the thing it self cannot be: And it is against the office of the justices, and the authority given them by the law, that they shall go and seek the parties. 12 Co. 130, 131. Power to convene the parties.

17. Where a statute gives power to the justices of the peace, to hear and determine an offence in a summary way; it is necessarily implied, and supposed, as a part of natural justice, that the party be first cited, and have opportunity to be heard and answer for himself. 1 Haw. 154. Necessity of summoning the party.

18. Where an act of parliament gives power to two justices finally to hear and determine an offence, it is necessarily supposed, that they shall be both together, or which is the same thing in other words, that they shall hold a special sessions for that purpose. And the like is, when they are to do any other judicial act, as to make an order of bastardy, or adjudge the settlement of a poor person. For it is unknown to the laws of England, that two persons shall act as judges in the same cause, when at the same time one of them is in one part of the county, and the other in another. Two justices to be both together.

19. Where a statute appoints a conviction to be on the *oath of one witness*; this ought not to be by the single oath of the informer; for if the same person should be allowed to be both prosecutor and witness, it would induce profligate persons to commit perjury for the sake of the reward. L. Raym. 1545. Informer's oath.

20. Where a statute directeth, that a person shall be convicted of an offence, upon the *oath of one or more witnesses*, and saith nothing of the *confession* of the party; yet if the offender shall before the justice confess the offence, he may be convicted upon such Confession.

such confession: for confession is stronger evidence than the oath of witnesses. *Dalt.* 109, 162. *Str.* 546.

Discretionary
power.

21. Where an act of parliament gives power to the justices of the peace, to take order in any matter *according to their discretions*; this shall be understood, according to the rules of reason, law, and justice, and not by private opinion. 5 *Co.* 100.

England includes
Wales.

22. In all cases where *the kingdom of England, or that part of Great Britain called England*, hath been or shall be mentioned in any act of parliament; the same shall be deemed to comprehend *the dominion of Wales, and town of Berwick upon Tweed.* 20 *G. 2. c. 42. f. 3.*

Twelve months.

23. It may be laid down as an invariable rule, that *the law favours liberty*: So that in the construction of a penal statute, where the interpretation is dubious, that sense must be pursued (all other things being equal) which is more beneficial to the subject, or the party suffering. Thus, where an act directs, that the justices shall commit an offender to prison for 12 *months*, the justices may not alter the words, and commit him for *a year*; for in this respect, 12 months and one year are not the same: but the months must be computed at 28 days to the month, and not as kalendar months, unless it be so expressed in the act.

Quakers affirma-
tion.

24. In all cases wherein, by any act of parliament, an oath shall be allowed or required; the solemn affirmation of quakers shall be allowed instead of such oath, altho' no particular or express provision be made for that purpose in the said act. 22 *G. 2. c. 46. f. 36.*

But no quaker shall by virtue hereof be qualified or permitted to give evidence in any criminal cause, or serve on any jury, or bear any office or place of profit in the government. *f. 37.*

25. To say that a person shall *forfeit* generally, Forfeiture. or that he shall *forfeit to the king*, is all one; for the king shall have every forfeiture not otherwise limited. 11 Co. 60.

Except where a forfeiture is given *in lieu of property and interest*; for there it shall go to the party injured. 1 Roll's Rep. 90.

For whosoever a statute giveth a forfeiture or penalty, against him which wrongfully detaineth or dispossesseth another of his duty or interest; in that case, he that hath the wrong shall have the forfeiture or penalty, and shall have an action for the same upon the statute, and the king shall not have the forfeiture in that case. 1 Inst. 159.

26. Where a statute saith, that such a person shall pay *fine and ransom* to the king; in legal understanding, such fine and ransom are all one: for if they were divers, then should the party pay two sums, one for the fine, and another for the ransom; which was never done. 1 Inst. 127. Fine and ransom.

27. Acts of parliament that speak of fines or ransoms *at the king's pleasure*, are always to be understood of the king in his courts by his justices. 1 H. H. 375. At the king's pleasure.

28. It is said that whosoever a justice of the peace is impowered, by any statute, to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing; the justice may commit him to the gaol, to remain there till he shall comply. 2 Haw 116. Where a power of commitment it implied.

29. When a statute appoints imprisonment, but limits no time when; it shall be immediately. 8 Co. 119. Imprisonment, when.

30. When a statute appoints imprisonment, but limits no time how long; the prisoner in such case must remain at the discretion of the court. Dalt. 410. Imprisonment, how long.

31. Where any offender shall by a justice of the peace be committed to the house of correction, for an offence cognizable before him out of sessions, Commitment to the house of correction, for what time.

sions, and the time and manner of punishment is not by law expressly limited; he may commit him to the house of correction, *there to be kept to hard labour, until the next general or quarter sessions, or until discharged by due course of law.* 17 G. 2. c. 5. §. 34.

Statute making
an offence felony.

32. Wherever a statute makes any offence felony; it incidentally gives it all the properties of felony at common law. 1 Haw. 105.

Misprision

33. Therefore an act of parliament that makes an offence felony, doth consequently introduce the punishment of concealing, that is, misprision of felony; and every offence made felony by act of parliament, includeth misprision. 1 H. H. 708.

Infants.

34. An act making a new felony, extendeth not to infants under 14 years of age; but if they be of that age; it binds them. 1 H. H. 706.

Life and member.

35. Not only those crimes which are made felonies by the express words of any statute, but also those which are decreed to have or undergo judgment of life and member, do become felonies thereby, whether the word felony were mentioned or not. 1 Haw. 107.

Body and goods.

36. But an offence shall never be made felony, by the construction of any doubtful and ambiguous words of a statute; and therefore if it be only prohibited under pain of forfeiting body and goods, or of being at the king's will for body, lands, and goods, it shall amount unto no more than a high misdemeanor, punishable by imprisonment or the like. 1 Haw. 107.

Benefit of clergy.

37. All felonies by the common law have the benefit of clergy; therefore where a statute enacts a felony, and lays, the offender shall suffer death, clergy lies notwithstanding, and is never ousted without express words. 3 Inst. 73. 2 Haw. 342.

Forfeiture of dower.

38. Saving of dower in a statute making an offence felony, is superfluous; for by the 1 Ed. 6. c. 12. Dower is not lost by the felony of the husband. §. 17.

39. Where a penalty is given to an informer Costs. upon a penal statute; he shall have no *costs*, unless the statute itself directs it, but he shall pay his costs out of the penalty. 2 *Haw.* 274.

Therefore where a justice hath power to inflict a pecuniary penalty, not exceeding such a sum; he may do well in such penalty to consider the costs of prosecution.

40. No *damages* can be given to the party griev- Damages. ed, upon an indictment, or any other criminal prosecution; and where by statute damages are given to the party grieved, it seems that they cannot be recovered on an indictment at the suit of the king, grounded on such statute, unless such method of recovering them be expressly given by the statute; but that they ought to be sued for in an action on the statute, in the name of the party grieved. But it is every day's practice in the court of king's bench, to induce defendants to make satisfaction to prosecutors, for the costs of the prosecution, and also for the damages sustained, by intimating an inclination on that account to mitigate the fine due to the king. 2 *Haw.* 210.

41. Where a statute gives *treble damages*; the Treble damages. justices are not to assess the damages, and then treble them; but the jury ought to find the damages, and then the justices are to treble them. *Cro. Car.* 449.

42. In all cases where a justice is or shall be Distress and sale. required by any act of parliament, to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money directed to be paid by such act; it shall be lawful for such justice granting such warrant, therein to order and direct the goods and chattels so to be distrained, to be sold and disposed of within a certain time to be limited in such warrant, so as such time be not less than 4 days, nor more than 8 days, unless such penalty or sum of money, together with reasonable charges of taking and keeping the distress, be sooner paid. And the officer making such distress, may deduct

deduct the reasonable charges of taking, keeping, and selling such distress, out of the money arising by such sale; and the overplus (if any) after such charges, and also the said penalty or sum of money, shall be satisfied and paid, shall be returned on demand to the owner of the goods and chattels so distrained. (Except only in cases of distress for quakers tithes and church rates.) 27 Geo. 2. c. 20.

Second offence.

43. An act inflicting a penalty for a *second offence*, must always be understood, after conviction and judgment for the first offence; and the second offence must be committed after the first conviction, and judgment thereupon given; for it doth not appear to be an offence, until judgment by proceeding of law be given against the offender. 2 Inst. 468.

And the indictment for a second offence, must recite the record of the first conviction; and upon the evidence, the record of the first conviction must be proved: but the matter of the first conviction shall never be re-examined, but must stand for granted. 1 H. H. 686.

Abjuration Oath. See Oaths.

Accessory.

I. Of accessories in general.

II. Of accessories before the fact.

III. Of accessories after the fact.

IV. How they are to be proceeded against.

I. Of accessories in general.

1. **A**CCCESSARY (*quasi accedens ad culpam*) is *he* Accessary, what, that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt.

2. In the highest capital offence, namely, high treason, there are no accessories, neither before nor after; for the consenters, aiders, abettors, and knowing receivers and comforters of traitors, are all principals. 1 *Hale's Hist.* 613. In the highest offence, no accessories.

But yet as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried, before those that are principals in the second degree; because otherwise this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd. 1 *H. H.* 613.

3. In cases that are criminal, but not capital, as in *petit larceny* and *trespasses*, there are no accessories; for the accessories *before* are in the same degree as principals; and accessories after, by receiving the offenders, cannot be in law under any penalties as accessories, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. 1 *H. H.* 613. In the lowest offences, no accessories.

4. It remains therefore, that the business of this title of accessories refers only to *felonies*, whether by the common law, or by act of parliament. Accessories only in felony.

5. Concerning which, Lord *Coke* observes generally, that when any offence is felony, either by the common law, or by statute, all accessories both before and after are incidentally included. 3 *Infl.* 59. Accessories implicated in felony.

Accessories in felonies by statute.

6. But as to felonies by act of parliament, Lord *Hale* distinguishes thereupon as follows: Regularly (he says) if an act of parliament enact an offence to be felony, tho' it mention nothing of accessories before or after, yet virtually and consequentially those that counsel or command the offence, are accessories before, and those that knowingly receive the offender are accessories after. 1 *H. H.* 613.

But if the act of parliament that makes the felony, in express terms comprehend accessories before, and make no mention of accessories after, namely, receivers or comforters, there it seems there can be no accessories after; for the expression of procurers, counsellors, or abettors, all which import accessories before, make it evident, that the law-makers did not intend to include accessories after, which is an offence of a lower degree than accessories before. 1 *H. H.* 614.

And altho' it be generally true, that an act of parliament creating a felony, renders consequentially accessories before and after within the same penalty, yet the special penning of the act sometimes varies the case: Thus the statute of 3 *H. 7. c. 2.* for taking away women, makes the taking away, and the procuring and abetting, yea and wittingly receiving also, to be all equally *principal* felonies, and excluded of clergy. Again, the statute of 27 *Eliz. c. 2.* makes the coming in of a jesuit *treason*, the receiving or relieving of him *felony*, the contributing of money to his relief a *præmunire*. So that acts of parliament may diversify the offences of accessory or principal, according to the various penning thereof, and so have done in many cases. 1 *H. H.* 614, 615.

How far accessories by statute shall have their clergy.

7. Also a statute excluding the principals from the benefit of clergy, doth not thereby exclude the accessories before or after; neither doth a statute, excluding the accessories, thereby exclude the principals. 2 *Haw.* 342.

II. Of accessories before the fact.

Accessory before. An accessory before the fact committed, is he that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony.

Being absent at the time of the felony committed] For if he is present, he is not an accessory, but a principal.

So also, if divers come to commit an unlawful act, and be present at the time of the felony committed, tho' one of them only doth it, they are *all* principals. *Hale's Pl.* 215.

So if one present move the other to strike; or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if one present deliver his weapon to the other that strikes: for they are *present*, aiding, abetting, or comforting. *id.* 216.

So if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in it self, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, or to favour (if need be) the escape of those who are more immediately engaged: they are all, provided the fact be committed, in the eye of the law *present* at it. For it was made a common cause with them; each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprize. *Foster's Crown Law* 350.

But if one came casually, not of the confederacy, tho' he hindred not the felony, he is neither principal nor accessory, altho' he apprehend not the felon; but for his negligence he is punishable by fine and imprisonment. *Hale's Pl.* 216. 2 *Haw.* 313.

Also in some cases, even a person absent may be principal; as he that puts poison into any thing to poison another, and leaves it, tho' not present when it is taken: And so it seems all that are present when the poison is so infused, and consenting thereunto. *Hale's Pl.* 216.

Procure, counsel, command, or abet] But here note some diversities: As,

(1.) *When the principal doth not accomplish the fact altogether in the same sort, as it was beforehand agreed between him and the accessory.* And therefore if one commands another to lay hold upon a third person, and he lays hold upon him and robs him, the person commanding is not accessory to the robbery; for his command might have been performed without any robbery. *Dalt. c.* 161.

But if the command had been to beat him, and the party commanded doth kill him, or beat him so that he dieth thereof; the person commanding shall be accessory to the murder: for it is a hazard in beating a man, that he may die thereof. *Dalt. c.* 161.

(2.) *He that commandeth or counselleth any evil or unlawful act to be done, shall be adjudged accessory to all that shall ensue upon the same evil act, but not to any other distinct thing.* As if one command another to steal a horse, and he stealeth an

ox; or to rob a man by the highway of his money, and he robs him in his house of his plate; or to burn such a one's house, and he burneth the house of another: These are other acts and felonies than he commanded to be done, and therefore he shall not be adjudged accessary to them. *Dalt. c. 161.*

(3.) *But if a person commit the same felony, which another did command or counsel to be done, tho' he doth it at another time, or in another place, or in another sort than was commanded or counselled, yet here such person commanding or counselling shall be accessary.* As if he doth counsel to kill a man by poison, and he kills him with a dagger; or to kill him by the highway, and he kills him in his house; or to kill him one day, and he kills him on another day; in these and the like cases, he shall be accessary. *Dalt. c. 161.*

(4.) *Those offences which in the construction of law are sudden and unpremeditated, cannot have any accessaries before.* As killing a man by misadventure, in his own defence, or manslaughter: For in such case there can be no procuring, counselling, commanding, or abetting. But there may be accessaries after. *1 H. H. 616.*

(5.) It seems to be generally agreed, that *he who barely conceals a felony, which he knows to be intended, is guilty only of a misprison of felony, and shall not be judged an accessary; for this is not procuring, counselling, or abetting.* *2 Haw. 317.*

(6.) Also, if a man counsels or commands another to kill a person, and before he hath killed him, he who counselled or commanded it, repents, and *countermands* it, charging him not to kill him, and yet after he doth kill him; here such person countermanding shall not be adjudged accessary to the murder: For, generally, the law adjudgeth no man accessary to a felony before the fact, but such as continue in that mind at the time that the felony is done and executed. *Dalt. c. 161.*

(7.) But if a person advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice; he is an accessary to the murder, tho' at the time of the advice, the child not being born, no murder could be committed of it: For the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon, as if he had given his advice after the birth. *2 Haw. 315.*

III. Of accessaries after the fact.

Accessary after the fact is, where a person knowing the felony to be committed by another, relieves, comforts, or assists the felon. Accessary after,

Knowing the felony to be committed] There can be no doubt, but that it is necessary that the receiver have notice of the felony, either express or implied, and so to be laid in the indictment, that the receiver *knew* that the person received by him, had committed the principal felony. 2 Haw. 319.

The felony] This as hath been said, holds place only in felonies, and in those felonies, where by the law judgment of death regularly ought to ensue; and therefore not in petit larceny. 1 H. H. 618.

And therefore if a person do barely receive, comfort or conceal an offender guilty of any common trespass, or inferior crime of the like nature, tho' he know him to have been guilty, and that there is a warrant out against him, yet he is not an accessary to the offence; but perhaps in such case he may be indictable for a contempt of the law, in hindring the due course of justice. 2 Haw. 311.

Relieves, comforts, or assists the felon] In the explication of these words several things are considerable;

(1.) Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessary to the felony; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. 2 Haw. 317.

(2.) But if a man knows that a person hath committed a felony, but doth not discover it, this doth not make him an accessary, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned. 1 H. H. 618.

(3.) Also if a man sees another commit a felony, but consents not, nor yet takes care to apprehend him or to levy hue and cry after him, or upon hue and cry levied doth not pursue him; this is a neglect punishable by fine and imprisonment, but it doth not make him an accessary. 1 H. H. 618.

(4.) In like manner, if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him accessary; but if

Accessary:

he take money of the felon to suffer him to escape, this makes him accessary: And so it is if he shuts the fore door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes him an accessary; for here is not a bare omission, but an act done by him to accommodate the felon's escape. 1 *H. H.* 619.

(5.) Also it seems to be settled at this day, that whosoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessary to the felony. 2 *Haw.* 318.

(6.) But if a felon be in prison; he that relieves him with necessary meat, drink, or cloaths, for the sustentation of life, is not accessary. 1 *H. H.* 620.

(7.) So if he be bailed out; it is lawful to relieve and maintain him, for he is still in some sort in custody, and is under a certainty of coming to his trial. 1 *H. H.* 620.

(8.) But if a felon be in gaol; for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape, makes the party an accessary; for tho' common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. 1 *H. H.* 621.

(9.) The sending a letter in favour of a felon, or advising to labour witnesses not to appear, makes no accessary; but it is a high contempt. *Hale's Pl.* 219.

(10.) A man may be accessary to an accessary, by the receiving of him knowing him to be an accessary to felony. 1 *H. H.* 622.

(11.) If a man hath goods stolen, and he receives his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessary; but if he take money of him to favour him, whereby he escapes, this makes him accessary. 1 *H. H.* 619.

(12.) And if any person shall receive or buy stolen goods, knowing them to be stolen; or shall receive, harbour, or conceal the thieves; he shall be deemed an accessary, and be transported for fourteen years. 3 *W. c.* 9. *f.* 4. 5 *Ann. c.* 31. *f.* 5. 4 *Geo. c.* 11. And buying the goods at an undervalue, is a presumptive evidence, that he knew they were stolen. 1 *H. H.* 619.

(13.) It seems agreed, that the law hath such a regard to that duty, love, and tenderness, which a wife owes to her husband, as not to make her an accessary to felony by any receipt given to her husband; yet if she be any way guilty

of procuring her husband to commit it, it seems to make her an accessory before the fact, in the same manner as if she had been sole. Also it seems agreed, that no other relation besides that of a wife to her husband, will exempt the receiver of a felon from being an accessory to the felony; from whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another. 2 *Haw.* 320.

(14.) But if the wife alone, the husband being ignorant of it, do receive any other person being a felon; the wife is accessory, and not the husband. 1 *H. H.* 621.

(15.) But if the husband and wife both receive a felon knowingly, it shall be judged only the act of the husband, and the wife shall be acquitted. 1 *H. H.* 621.

IV. How they are to be proceeded against.

1. By 3 *Ed.* 1. c. 15. Those who are *accused of the receipt of felons, or of commandment, or of force, or of aid of felony done, shall be bailable*; but this seemeth to be only where it stands indifferent whether the party be guilty or innocent; for if there are strong presumptions of guilt, it seemeth that he is not bailable. 2 *Haw.* 102. Accessories how far bailable.

2. Where a person is feloniously stricken or poisoned in one county, and dies thereof in another county, the accessory may be indicted in the county where the death shall happen. 2 & 3 *Ed.* 6. c. 24. *f.* 2, 3. In what county to be tried.

Also, where a murder or felony shall be committed in one county, and a person shall be accessory in another county, the accessory may be indicted in the county where he was accessory: And the judges of assize, or two of them, of the county where the offence of the accessory shall be committed, on suit to them made, shall write to the keeper of the records where the principal shall be convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged; which he shall certify under his seal. 2 & 3 *Ed.* 6. c. 24. *f.* 4.

3. The accessory may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony. 1 *H. H.* 623. Accessory and principal in the same indictment

4. It seemeth that the accessory may be put to answer before the principal hath appeared; but his plea cannot be tried before such appearance, unless he desire it himself; but it

he will put himself upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon such trial, is good. 2 *Haw.* 322. 1 *H. H.* 623.

But it seemeth necessary in such case to respite judgment, till the principal be convicted; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him: But if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 1 *H. H.* 623, 624.

Both tried by
one inquest.

5. It seems to be settled at this day, that if the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also; and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted; and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessory not guilty. But it seems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the accessory shall not be forced to answer, till that plea be determined; for if it be found for the principal, the accessory is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. 2 *Haw.* 323. 1 *H. H.* 624.

Accessory may
be tried, tho'
the principal be
not attainted.

6. Anciently the accessory could not be tried, unless the principal were *attainted* (3 *Ed.* 1. c. 14.) but by the 1 *Ann.* *stat.* 2. c. 9. s. 1. If the principal be convicted, or stand mute, or peremptorily challenge above twenty of the jury, the accessory may be tried and punished as if the principal had been attainted; and this, altho' the principal be admitted to his clergy, pardoned or otherwise delivered before attainder.

Receiver of stolen
goods may
be tried before
the principal.

7. But in the case of stolen goods, if the principal cannot be taken, the buyer or receiver may be prosecuted as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit, altho' the principal be not convicted; which shall exempt the offender from being punished as accessory, if the principal be afterwards taken and convicted. 1 *Ann.* *stat.* 2. c. 9. s. 2. 5 *Ann.* c. 31. s. 6. And by the 29. *Geo.* 2. c. 30. The buyer or receiver of stolen lead, iron, copper, brass, bell-metal or solder, may be convicted, altho' the principal hath not been convicted; and shall be transported for fourteen years.

Case where a
person is charged
as accessory to
more than one.

8. It seemeth not reasonable, Mr. *Hawkins* says, where a person is charged as accessory to more than one principal, to try him on the conviction of one, before all of them have appeared; because hereby he may be subject to the hardship and hazard of two trials for his life for the same offence,

offence, which is contrary to the general course of the law. 2 *Haw.* 323.

But if a man be indicted as accessary to two or more, and the jury find him accessary to one, it is a good verdict, and judgment may pass upon him. *Fost.* 361.

And therefore the court in their discretion (*Sir Michael Foster* says) may arraign him as accessary to such of the principals who are convicted; and if he be found guilty as accessary to them or any of them, judgment shall pass upon him: But on the other hand, if he be acquitted, that acquittal will not discharge him as accessary to the others. And when they come in and are convicted and attainted, or if judgment of outlawry passeth against them, he may be arraigned *de novo* as accessary likewise to them. Altho' it is the safer course (according to lord *Hale*) to respite the arraignment of the accessary, till all appear or are outlawed. *Fost.* 361.

9. If the principal be erroneously attaint, yet the accessary shall be put to answer, and shall not take advantage of the error in that attainder; but the principal reversing the attainder, reverseth the attainder of the accessary. 1 *H. H.* 625.

Case where the principal is erroneously attainted.

But upon this, *Sir Michael Foster* distinguisheth as follows: If the principal and accessary are joined in one indictment and tried together, which seems to be the most eligible course where both are amenable to the court; there is no room to doubt, whether the accessary may not enter into the full defence of the principal, and avail himself of every matter of fact, and every point of law tending to his acquittal. For the accessary is in this case to be considered as a partner in the suit, and this sort of defence necessarily and directly tendeth to his own acquittal. *Fost.* 365.

But when the accessary is brought to his trial, *after* the conviction of the principal; it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor doth the indictment aver that the principal was in fact guilty. It is sufficient if it reciteth, with proper certainty, the record of the conviction. This is evidence against the accessary, sufficient to put him upon his defence. For it is founded on a legal presumption, that every thing in the former proceeding was rightly and properly transacted. But a presumption of this kind must, as it seemeth, give way to facts manifestly and clearly proved. As against the accessary, the conviction of the principal will not be conclusive; it is as to him *res inter alios acta.* id.

And

Accessory.

And therefore if it shall come out in evidence upon the trial of the accessory, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged; the accessory may avail himself of this, and ought to be acquitted. *id.*

And as in point of *law*, so also in point of *fact*, if it shall manifestly appear in the course of the accessory's trial, that the principal was innocent; common justice seemeth to require that the accessory should be acquitted. As suppose a man is convicted upon circumstantial evidence, strong as that sort of evidence can be, of murder. Another is afterwards indicted as accessory to this murder; and it cometh out upon the trial by incontestable evidence, that the person who was supposed to be murdered is still living; in this case certainly the person indicted as accessory shall be acquitted. Or suppose the person to have been in fact murdered, and that it should come out in evidence to the satisfaction of the court and jury, that the witnesses against the principal were mistaken in his person (a case of this kind Sir *Michael Foster* says he has known), that the person convicted as principal was not nor could possibly have been present at the murder. *id.* 367, 368.

Accessory acquitted may be indicted as principal.

Whether the principal acquitted may be indicted as accessory before.

10. If one person be indicted as principal, and another as accessory, and both be acquitted; yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. 1 *H. H.* 625.

11. But if a person be indicted as principal and acquitted; lord *Hale* says, he shall not be indicted as accessory before: And if he be, he may plead his former acquittal in bar, for it is in substance the same offence. 1 *H. H.* 626.

But Sir *Michael Foster* observes upon this, that in the eye of the law, the offences of principal and accessory do specifically differ; and if a person indicted as principal, cannot be convicted upon evidence tending barely to prove him to have been accessory before the fact, which must needs be admitted, it doth not appear how an acquittal upon one indictment can be a bar to a second for an offence specifically different from it. *Fost.* 362.

Principal acquitted may be indicted as accessory after.

12. So if a man be indicted as principal, and acquitted; he may be indicted as accessory after, for they are offences of several natures. 1 *H. H.* 626.

Accessory before, acquitted, may be indicted as accessory after.

13. And so it is, if he be indicted as accessory before, and acquitted; yet for the same reason he may be indicted as accessory after. 1 *H. H.* 626.

Indictment of an accessory before the fact, taken from *Coke's* report of *Lord Sanchar's* case, 9 Co. 116. which, as the prosecution was by the king's special command, was probably drawn by good advice; and on which *Robert Creighton*, esquire, (*Lord Sanchar* of *Scotland*) was convicted and hanged; viz.

Middlesex. **T**HE jurors do present for the lord the king upon their oath, That whereas Robert Carliel late of London, yeoman, and James Irweng late of London aforesaid, yeoman, not having god before their eyes, but seduced by the instigation of the devil, the eleventh day of May in the year of the reign of our lord James by the grace of god of England, France, and Ireland, king, defender of the faith, and so forth, the tenth, and of Scotland the forty-fifth, at London, that is to say, in the parish of St. Dunstan in the West, and in the ward of Farringdon without London aforesaid, &c. with force and arms, &c. feloniously and of their aforethought malice, in and upon one John Turner then and there in the peace of god and of the said lord the king being, made an assault and affray, and the aforesaid Robert Carliel a certain gun [tormentum] called a pistol, of the value of 5s. then and there charged with gunpowder and a leaden bullet, which gun the said Robert Carliel in his right hand then and there had and held, in and upon the aforesaid John Turner then and there feloniously, voluntarily, and of his malice forethought, did shoot off and discharge; and the aforesaid Robert Carliel, with the leaden bullet aforesaid from the gun aforesaid then and there shot and discharged, the aforesaid John Turner in and upon the left part of the breast of him the said John Turner, near the left pap of him the said John Turner, then and there feloniously struck, giving to the said John Turner then and there with the leaden bullet aforesaid out of the gun aforesaid then and there shot off and discharged, in and upon the left part of the breast of him the said John Turner, one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid John Turner at London aforesaid, in the parish and ward aforesaid, instantly died: And that James Irweng feloniously, and of his forethought malice, then and there was present, aiding, assisting, abetting, comforting and maintaining the aforesaid Robert Carliel to the felony and murder aforesaid in form aforesaid to be done and committed; and so the aforesaid Robert Carliel and James Irweng the aforesaid John Turner at London aforesaid, in the parish and ward

Accessory.

ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice, killed and murdered, against the peace of the lord the now king, his crown and dignity; And that one Robert Creighton, late of the parish of St. Margaret in Westminster, in the county of Middlesex, esquire, not having god before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid by the aforesaid Robert Carliel and James Irweng in manner and form aforesaid done and committed, that is to say, the tenth day of May in the year of the reign of our lord James by the grace of god of England, France, and Ireland, king, defender of the faith, and so forth, the tenth, and of Scotland the forty-fifth, the aforesaid Robert Carliel, at the aforesaid parish of St. Margaret in Westminster aforesaid, in the county of Middlesex aforesaid, to the felony and murder aforesaid, in manner and form aforesaid to be done and committed, maliciously, feloniously, voluntarily and of his forethought malice, did incite, move, abet, counsel and procure, against the peace of the said lord the king that now is, his crown and dignity.

If after the fact, then the form may be thus;

And that A. O. late of ——— in the county of ——— yeoman, well knowing the said (offender) to have done and committed the said felony in manner and form aforesaid, afterwards, to wit, on the ——— day of ——— in the ——— year of the reign of ——— at ——— aforesaid in the county aforesaid, with force and arms, him the said ——— did then and there feloniously, and of his malice forethought, receive, aid, and comfort; against the peace of the said lord the king that now is, his crown and dignity.

Action popular. See **Information.**

Adultery. See **Lewdness.**

Addition.

TO prevent the inconvenience of troubling one person for another, it is enacted by 1 H. 5. c. 5. that in every original writ of actions personal, appeals, and indictments, in which the exigent shall be awarded, to the names of the defendants additions shall be made, of their estate or degree or mystery,

mystery, and of the towns, or hamlets, or places, and counties, of the which they were, or be: And if by process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any outlawries be pronounced, they shall be void; and before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party.

In which the exigent shall be awarded] The exigent is a writ whereby the sheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by these words the act extendeth only to cases where process of outlawry may be awarded; and therefore it extendeth not to an indictment for incroaching on a highway, because in that case process of outlawry lieth not, but a distress. *Croke Eliz. 148.*

To the names of the defendants] Regularly by the common law, every natural man, having no name of dignity, ought to be named in all originals and other suits by his christian name, and surname, and that, before this act, sufficed; but if he had a name of inferior dignity (as knight or banneret) he ought to be named by his christian name and surname, and by the addition of his name of dignity. *2 Inst. 666.*

If there be a corporation of one sole person, that hath a fee simple, and may have a writ of right, he may be named by the common law by his christian name without any surname, as *John* bishop of *P.* *2 Inst. 666.*

If it be a corporation aggregate of many able persons, as mayor and commonalty, dean and chapter, the mayor or dean need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and surname. *2 Inst. 666.*

A duke, marquiss, earl, viscount, or baron might by the common law be named by his christian name, and by the name of his dignity; as *John* duke of *M.* *2 Inst. 666.*

Additions shall be made] The addition as well of the estate, degree, or mystery, as the town, hamlet, or place, ought by force of this act to be alledged, in the first name; for an addition after the *alias dictus* is ill: As for instance, where the indictment was against *W. R.* otherwise called *W. R. of H.* for without the *alias dictus* there is no addition of the vill; and if the party is not sufficiently named in the first part, the *alias* cannot aid or help it. *2 Inst. 669. 3 Salk. 20.*

Where there are several defendants of different names, and the same addition, it is safest to repeat the addition after each of their names, applying it particularly to every one of them. *2 Hawk. 187.*

Where a father hath the same name and the same addition with a defendant being his son, the action is abateable unless it add the addition of *the younger* to the other additions; but where the father is the defendant, it is said that there is no need of the addition of *the elder*. 2 Haw. 187.

Of their estate or degree] Esquire is a good addition; and the sons of all peers and lords of parliament in the life of their fathers, are in law esquires, and so to be named. Also the eldest son of a knight is an esquire. 2 Inst. 667.

And it seems clear, that no one can be well described by the addition of a temporal dignity of any other nation besides our own; because no such dignity can give a man a higher title here, than that of an esquire. 2 Haw. 187.

Gentleman and gentlewoman are good additions; and if a gentlewoman be named spinster, she may abate and quash the writ or indictment. 2 Inst. 668.

A gentleman by reputation, that is neither gentle by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a sufficient addition; but if he be named yeoman, he cannot quash the indictment. 2 Inst. 668.

Lord Coke says, he that hath taken any degree in either of the universities, may be named by that degree without question. 2 Inst. 668. But this is doubted by others. 2 Haw. 187.

Clerk is a good addition of a clergyman. 2 Inst. 668.

Yeoman and labourer are good additions, and are applied only to the man, and not to the woman. 2 Haw. 188.

Widow or singlewoman, or (as some say) wife of such a one, are all of them good additions of the estate and degree of a woman; but no such like addition is good, for the estate and degree of a man. And spinster is a good addition for the estate and degree of a woman, and perhaps also for that of a man. 2 Haw. 188.

Or mystery] This includeth all lawful arts, trades and occupations, as taylor, merchant, mercer, parish clerk, schoolmaster, husbandman, labourer, and the like. 2 Haw. 188.

But servant, groom, or farmer, are not additions within this act, because they are not of any mystery. And chamberer, butler, pantler, or the like, are additions of offices, and not of any mystery or occupation. 2 Inst. 668.

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretick, and such like. 2 Haw. 188.

If a man hath divers arts, trades, or occupations, he may be named by any of them; but if a gentleman by birth be a tradesman, he shall not be named by his trade, but by the degree of gentleman, because it is worthier than the addition of any mystery. And in general a man shall be named by his worthiest title of addition. 2 *Inst.* 668, 669.

And of the towns or hamlets] If there be two towns in a county of the same principal name, with different additions to distinguish them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant be named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the same county, and none without an addition. But if there be two towns of the same name in a county, without any addition to distinguish them, it may be sufficient in such case to name the defendant generally of either of such towns, without adding any thing to distinguish it from the other. 2 *Haw.* 189.

If the defendant live in a hamlet of a town, it is said to be in the election of the party to name him either of the hamlet or of the town. 2 *Haw.* 189.

But the addition of a parish, if there be two or more towns in it, is not good; but if there be but one town, the addition of parish is good. 2 *Inst.* 669.

The addition of the place of habitation of a wife, is sufficiently shewn, by shewing that of the husband; because it shall be intended that the wife lives where the husband does. 2 *Haw.* 190.

Or places] If the defendant lives in a place known by a special name, and lying out of any town or hamlet, he may be well named of such place; but if he live in any place known within a town or hamlet, it is said to be safest to name him of the town or hamlet. 2 *Haw.* 189, 190.

Of the which they were, or be] The addition of the estate, degree, or mystery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of such a degree or mystery; but it is a good addition to name the defendant *late* of such a town or place, because men do often remove their habitation. 2 *Inst.* 670.

Shall be void] This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias utlagatum*; for tho' the statute saith they shall be void, yet they are but voidable by a writ of error or plea. 2 *Inst.* 670.

By the exception of the party] But if the defendant appeareth upon process, and plead, taking no advantage thereof by

by exception, he hath lost the benefit hereof: But it seemeth that the bare appearance of the party, without plea, doth not folve the want of a good addition. 2 *Haw.* 190.

Advertisement. See *Stamps*.

Affray.

I. What is an affray.

II. How far it may be suppressed by a private person.

III. How far by a constable.

IV. How far by a justice of the peace.

V. Punishment of an affray.

I. What is an affray.

1. **A**N affray is a publick offence to the terror of the king's subjects; so called (according to lord Coke) because it affrighteth and maketh men afraid. 3 *Inst.* 158.

2. From whence it seemeth clearly to follow, that there may be an assault, which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned, in which case it cannot be said to be to the terror of the people. 1 *Haw.* 134.

3. Also it is said, that no quarrelsome or threatening words whatsoever, shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person who threatens to beat him, before a justice in order to find sureties. 1 *Haw.* 135.

4. Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. 1 *Haw.* 135.

5. But altho' no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in
such

such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute: For by 2 Ed. 3. c. 3. it is enacted, that *no man of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers during their office, with force and arms, nor bring any force in affray of peace, nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices, or other ministers, or elsewhere; upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure. And the king's justices in their presence, sheriffs and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables and wardens of the peace within their wards, shall have power to execute this act. And the judges of assize may punish such officers as have not done their duty herein.*

Upon a cry made for arms to keep the peace] It is holden upon these words of exception, that no person is within the intention of this statute, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. 1 *Haw.* 136.

In affray of peace] *En effrayer de la pees*; Lord Coke has it *pais*, of the country, or the people; and so, he observes, that the writ grounded upon this statute saith, *In quorundam de populo terrorem*; and therefore the printed book, *in affray of peace*, ought to be amended. 3 *Hist.* 158.

And it is holden upon these words, that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute, by wearing common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace. 1 *Haw.* 136.

Nor to go nor ride armed] It is holden, that a man cannot excuse the wearing such armour in publick, by alledging that such a one threatened him, and that he wears it for

the safety of his person from his assault; but it hath been resolved, that no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house against those who threaten to do him any violence therein, because a man's house is his castle. 1 *Haw.* 136.

Their bodies to prison] The statute of 20 R. 2. c. 1. adds a fine likewise.

Wardens of the peace] It is holden that any justice of the peace, or other person who is impowered to execute this statute, may proceed thereon *ex officio*; and if he find any person in arms, contrary to the form of the statute, he may seize the arms, and commit the offender to prison; and that he ought also to make a record of the whole proceeding, and certify the same into the exchequer. 1 *Haw.* 135.

II. How far it may be suppressed by a private person.

1. It seems agreed, that any one who sees others fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable to be carried before a justice, to find sureties for the peace. 1 *Haw.* 136.

2. And the law doth encourage him hereunto; for if he receives any harm by the affrayers, he shall have his remedy by law against them; and if the affrayers receive hurt, by the endeavouring only to part them, the standers by may justify the same, and the affrayers have no remedy by law. 3 *Inst.* 158.

3. But if either of the parties be slain, or wounded, or so stricken that he falleth down for dead; in that case the standers by ought to apprehend the party so slaying, wounding, or striking, or to endeavour the same by hue and cry; or else for his escape, they shall be fined and imprisoned. 3 *Inst.* 158.

III. How far by a constable.

1. It seems agreed, that a constable is not only impowered, as all private persons are, to part an affray which happens in his presence; but is also bound at his peril to use his best endeavours to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment. 1 *Haw.* 137.

2. And

2. And it is said, that if a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons or the like; or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice, to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation. But it seems, that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol, till he shall be punished for his offence: And it is said, that he ought not to lay hands on those, who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such case, is to command them under pain of imprisonment to avoid fighting. 1 *Haw.* 137.

3. But he is so far intrusted with a power over all actual affrays, that tho' he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party. 1 *Haw.* 137.

4. And if an affray be in an house, the constable may break open the doors to preserve the peace; and if affrayers fly to an house, and he follow with fresh suit, he may break open the doors to take them. 1 *Haw.* 137.

5. But it is said, that a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or likely to be done; for it is the proper business of a constable to preserve the peace, and not to punish the breach of it. 1 *Haw.* 137.

IV. How far by a justice of the peace.

There is no doubt, but that a justice of the peace may and must do all such things to the aforesaid purpose, which a private man or constable are either enabled or required by the law to do: But it is said, that he cannot without a warrant authorize the arrest of any person for an affray out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. 1 *Haw.* 137.

Affray!

V. Punishment of an affray.

All affrays in general are punishable by fine and imprisonment. 1 *Haw.* 138.

And they are inquirable in the leet, as common nuisances. 3 *Inst.* 158.

Warrant to apprehend affrayers.

Westmorland. { To the constable of——

WHEREAS A. I. of—— yeoman, hath this day made oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, that on the—— day of—— in the—— year of the reign of—— A. O. of—— yeoman, and B. O. of—— yeoman, at—— in the said county, in a tumultuous manner made an affray, wherein the person of the said A. I. was beaten and abused by them the said A. O. and B. O. without any lawful or sufficient provocation given to them, or to either of them, by him the said A. I. These are therefore to command you forthwith to apprehend the said A. O. and B. O. and bring them before me, or some other of his said majesty's justices of the peace for the said county, to answer the premisses, and to find sureties as well for their personal appearance at the next general quarter-sessions of the peace to be holden for the said county, then and there to answer to an indictment to be preferred against them by the said A. I. for the said offence, as also for their keeping the peace in the mean time, towards his said majesty and all his liege people, and especially towards him the said A. I. Hereof fail not, as you will answer the contrary at your peril. Given under my hand and seal at—— in the said county, the—— day of, &c.

Indictment for an affray.

THE jurors for our lord the king, upon their oath present, that A. O. of—— in the county of—— taylor, and B. O. of—— in the said county, blacksmith, with force and arms, on the—— day of—— in the—— year of the reign of our sovereign lord George the third, by the grace of god, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at—— aforesaid in the county aforesaid, being arrayed and unlawfully assembled together in a warlike manner, did make an affray, to the terror and disturbance

ance of divers of the subjects of our said sovereign lord the king then and there being, and to the evil example of all other the subjects of our said sovereign lord the king, and against the peace of our said lord the king, his crown and dignity.

Alamodes. See Silks.

Ale and Beer. See Excise.

Alhouses.

For matters relating to the *excise* of beer and ale, see title *Excise*.

- I. Concerning inns and alehouses in general.
- II. Selling ale without licence.
- III. Licensing alehouses.
- IV. Recognizance, and forfeiture thereof.
- V. To what places the licence shall extend.
- VI. How long the licence shall continue in force.
- VII. Offences in brewing of ale.
- VIII. Innkeepers obliged to receive guests.
- IX. Soldiers quartered in alehouses.
- X. Concerning ale vessels, and the measure of ale.
- XI. Conspiring to enhance the price of ale.
- XII. Selling in vessels of plate.
- XIII. Innkeeper suffering tipling.
- XIV. Persons guilty of tipling.
- XV. Concerning drunkenness.
- XVI. Detaining goods for the reckoning.
- XVII. Goods of a guest stolen out of an inn.
- XVIII. Guests stealing goods.

I. Concerning inns and alehouses in general.

1. **E**VERY inn is not an alehouse, nor is every alehouse an inn: but if an inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an inn.

2. It was resolved by all the judges, that any person might erect an inn to lodge travellers, without any licence

Difference between inns and alehouses.

licence to erect inns.

or allowance for such erection. *Dalt. c. 56. Black. 170.*

Inn indictable.

3. But it seems to be agreed, that the keeper of an inn may by the common law be indicted and fined, as being guilty of a publick nuisance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. *1 Haw. 225.*

Innkeeper selling ale.

4. And if an inn useth the trade of an alehouse, as almost all innkeepers do, it shall be within the statutes made about alehouses. *Dalt. 133. Black. 170.*

Inns to be licensed.

5. It hath been also agreed for law, that innkeepers ought to have licence, and be bound by recognizance for keeping good order, as alehousekeepers are. *Dalt. 24.*

Power of justices by the commission.

6. By the commission of the peace, two justices (1 *Q.*) may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights or measures, or in the sale of victuals, against the form of the ordinances in that behalf made.

II. Selling ale without licence.

By the 5 *G. 3. c. 46.* Whereas by the laws now in force, persons selling ale or beer, or other exciseable liquors by retail, without licence, are subject by different laws to different penalties and punishments, which has occasioned much confusion, and an ill use has been made thereof in many instances; it is therefore enacted, that every person lawfully convicted of selling ale or beer, or other exciseable liquors, by retail, without licence (except in fairs, 5 & 6 *Ed. 6. c. 25. 3 C. c. 3. 26 G. 2. c. 31.*) shall for every such offence forfeit and undergo the several penalties and punishments herein after mentioned, instead of the several pecuniary and corporal punishments which they are now subject to by any law now in force; that is to say, for the first offence 40s. and also the costs and expences of conviction; if not paid within 14 days after conviction, the offender to be imprisoned for one month, unless he shall sooner pay the penalty, and the costs, charges, and expences of the conviction, and of executing the same: for the second offence 4l. and also the costs and expences of conviction; if not paid within one week after conviction, to be imprisoned two months, unless he shall sooner pay the penalty, and the costs, charges,

charges, and expences of such second conviction, and of executing the same: for the third offence 6 l. and also the costs and expences of conviction; if not paid within three days after conviction, to be imprisoned for three months, unless he shall sooner pay the penalty, and the costs, charges, and expences of such third conviction, and of executing the same: and the like penalty for every other offence after the third, as for the third offence. All which costs and expences shall be ascertained by the justice before whom the offender shall be convicted. One moiety of all which penalties and forfeitures shall be to the king; and the other moiety, and also all such costs, charges, and expences to the prosecutor. *f. 22.*

The same to be heard and determined by one justice; who shall, on information (A) exhibited or complaint made to him, summon (B) the party accused, and also the witnesses on either side (if he shall be required to summon any such); and on appearance of the party accused, or contempt in not appearing, shall proceed to hear the matter, and examine witnesses on oath, and give judgment; and if he convict (C) the party accused, and such party shall refuse to pay the penalty within the time above expressed, together with the costs as aforesaid, he shall issue his warrant for apprehending and committing (D) to prison every such offender, for such time, and in such manner, as the nature of the offence shall require. *f. 23.*

And any person may be a witness in such case, notwithstanding he pays to the poor of any place where the offence shall be committed. 26 G. 2. c. 31. *f. 17.*

Also where any justice shall suspect that any person sells without licence, he may call such person before him, and also any excise officer or gauger to produce his stock book or other account of the charge or survey of such suspected person, and may examine such officer on oath in what manner he charges such person, and how such person pays the duties; and if it shall appear by such stock book or account, or oath of the officer, that such person is surveyed as a victualler or retailer, and is charged with the same duties that victuallers and retailers are charged with and pay for any the liquors aforesaid, and is not intitled to the allowance or abatement given to common brewers, he shall be deemed an alehousekeeper, victualler, retailer, or seller thereof. 26 G. 2. c. 31. *f. 9.*

Witness neglecting or refusing to appear upon summons at the time and place appointed, without a reasonable excuse to be allowed by such justice, or appearing and refus-

ing to be examined on oath and give evidence ; shall forfeit 20 s. to be levied in such manner and by such means as is before directed. 5 G. 3. c. 46. §. 24.

Note, This penalty is but small, and might defeat the intention of the act ; for by the witness paying 20 s. the offender may chance to escape the payment of 2, 4, or 6 l. besides charges. But there is a clause in the statute of the 26 G. 2. c. 31. which enacts, that if any person summoned as evidence in such case shall refuse to appear, or shall appear and refuse to give evidence upon oath ; he shall forfeit 10 l. §. 10. †

And if any person shall think himself aggrieved by the conviction of such justice, and shall give security to the satisfaction of the said justice for payment of the penalty, costs, and expences, to be expressed in the *warrant of distress* on such conviction ; he may appeal to the next sessions, unless such sessions shall be held within six days next after the conviction, and in that case to the next sessions after. And if the sessions adjudge the appeal to be frivolous or vexatious, they may give costs against the appellant, not exceeding 5 l. 5 G. 3. c. 46. §. 25.

[Note, there seems to be a mistake, in setting forth that the costs shall be expressed in the *warrant of distress* ; for no power of distress is given : The meaning seems to have been, that the same shall be expressed in the *conviction* ; as is specified in the form prescribed by the act.]

The clause excepting *fairs*, in the several acts, is from the necessity of the thing, respecting the accommodation of persons resorting thither. But those who shall brew such ale or beer, to be sold by them in fairs, must take

† But how this 10 l. shall be levied, is not quite clear. By the aforesaid act of the 5 G. 3. c. 46. it is expressed, that all penalties for offences against the said act, or *against the said former act*, shall be heard and determined as is above set forth. Now there are many acts mentioned before ; but what seems to be particularly intended in this place is, such act or acts as did inflict penalties on persons selling ale or beer without licence. And there are three acts of this kind, which were the cause as aforesaid of diversity and confusion. And therefore it seemeth that this expression should have run [*against this or the said former acts*], that is, against the laws inflicting penalties on persons selling ale or beer without licence. But as it stands, this penalty of 10 l. seems to be recoverable as it was before, by the said act of the 26 G. 2. c. 31. that is to say, by distress by warrant of one justice, and to be paid to the overseers for the use of the poor where the offender lives.

care to give notice to the gagers, that the same may be surveyed; for tho' they are exempted from taking licence, yet they must nevertheless pay the duties of excise. And this indulgence seemeth to be intended only in the place where the common fair is held; and not in any private house, which may be within the limits of the town where such fair shall be kept, especially wherein there are licensed alehouses sufficient.

BY the statute of the 4 J. c. 4. If any person shall sell or deliver any beer or ale, to any person that shall then sell beer or ale as a common tipler or alehousekeeper, the same person not having licence to sell ale or beer (except it be for the use of his household only); he shall forfeit for every barrel 6s. 8d. and so proportionably for other quantities; half to the poor, and half to him that shall sue in sessions, by action of debt, information, indictment, or presentment.

III. *Licensing alehouses.*

1. By the 5 & 6 Ed. 6. c. 25. any two justices, 1 2. By two justices at a general meeting. might license alehouses; but now by the 2 G. 2. c. 28. and 26 G. 2. c. 31. it is enacted, that whereas many inconveniencies have arisen from persons being licensed to keep inns and common alehouses, by justices, who living remote from the places of abode of such persons, may not be truly informed as to the occasion or want of such inns or common alehouses, or the characters of the persons applying for licences to keep the same; therefore from henceforth no licence shall be granted to any person to keep a common inn or alehouse, but at a general meeting of the justices acting in the division where the said person dwells, to be holden for that purpose, on the first day of *September* yearly, or within twenty days after, and not at any other time. Excepting, that this shall not alter the power or the time of granting licences, in cities and towns corporate. 2 G. 2. c. 28. s. 11, 12. 26 G. 2. c. 31. s. 4. 16.

To keep a common inn or alehouse] In the case of *Parker and Flint, M. 10 W.* it was determined, that houses at *Epsom*, where they take in lodgers and boarders, coming to drink the waters there during the season, and dress victuals, and sell them ale and beer, and entertain their horses at 8d. a day, but to sell to no other persons, are not

not inns nor alehouses within the meaning of these acts.
12 *Mod.* 254.

At a general meeting of the justices holden for the division]
But it is not necessary to set forth specially in the licence, that it was granted at a general meeting of the justices holden for the division; and therefore a conviction for keeping an alehouse without such licence, is not good upon the evidence of the licence only, but there must be other evidence. *M. 11 G. 2. King and Bryan. Sess. Ca. Vol. 2. 183. Andr. 81.*

The meeting
how to be ascer-
tained.

2. And the day and place for granting licences shall be appointed by two or more justices for the division, by warrant (E) under their hands and seals, at least ten days before such meeting, directed to the high constables, requiring them to order (F) their petty constables, or other peace officers, to give notice to the several innkeepers and alehousekeepers within their respective constablewicks, of the day and place of such meeting. And all licences granted at any other time or place shall be void. 26 *G. 2. c. 31. s. 4.*

Certificate of
persons to be li-
censed.

3. And no licence shall be granted to any person not licensed the year preceding (except in cities or towns corporate) unless he produce a certificate under the hands of the minister and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders of the place, setting forth that such person is of good fame and of sober life and conversation; and it shall be mentioned in such licence that such certificate was produced, otherwise the licence shall be void. 26 *G. 2. c. 31. s. 2. 16.*

Except in cities and towns corporate] In cities and towns corporate, such certificate is supposed not to be necessary, by reason of the propinquity of the persons to be licensed.

Whether a man-
damus will lie to
compel the ju-
stices to grant a
licence.

4. Nevertheless, altho' a certificate in such places is not requisite by this act, yet it is discretionary in the justices whom they will license, and a *mandamus* in such case will not lie to compel the justices to license any person; and on a conviction for selling without licence, the want of such licence can only come in question, and not the reason why it was denied. *Strange 881.*

So in the case of the *King* against the justices of the peace of *Worcester*, *M. 4 G. 2.* a *Mandamus* was moved for to be directed to them, to grant a licence to a victualler to sell ale. Affidavits were offered to be produced, of the justices declaring that they would grant no licences to any of the inhabitants who signed a petition to the par-

liament

liament for erecting a workhouse there; and that the person, on whose behalf the motion was now made, had been a victualler in the town for above thirty-five years. The court said, that they never knew a motion of this sort granted; but if there was such a grievance, as is mentioned, another sort of motion would be more proper.

1 *Barnardist.* 402.

In the case of the *King* against *Young* and *Pitts*, *E.* 31 *G.* 2. In easter term, 30 *G.* 2. a motion was made for an information against Mr *Young* and Mr *Pitts*, justices of the peace for the county of *Wilts*, for refusing a licence to *Henry Day* at the *Rose* and *Crown* in *Everly*, *Wilts*; upon affidavits that there was no other commodious inn in the village; that Mr *Young* had licensed *Day* before, when he kept another house in *Ludgershall*; that there was no objection to his character, and that he had laid out all his fortune in fitting up the house to be licensed. The affidavits likewise suggested partiality in the justices, in favour of the landlord of the *White Horse*, another inn in the same village. On the special circumstances of the case and the seeming oppression, and on the other hand out of respect and tenderness to the justices, the court granted a rule to shew cause why they had refused the licence. Upon shewing cause, this rule was discharged, and another rule made, that the justices should shew cause why an information should not be filed against them. Upon shewing cause this term, Mr *Young* having sworn in his affidavit, that the vill would not maintain two publick houses, that there had been a determination at the quarter-sessions that no more houses should be licensed, and therefore that a preference ought to be given to the houses then in possession of a licence, lord *Mansfield* Ch. J. observed, that in this respect Mr *Young* had acted agreeable to his own opinion, to the charges given at the assizes, and the resolutions at the quarter-sessions. He said, the power of licensing is a special power and authority, with which the legislature have thought proper to intrust justices of the peace, to be exercised according to their discretion. By *discretion* is not meant arbitrary will, but sound judgment, *discernere per legem quid sit justum*. If the justices are corruptly biased to favour or refuse any person applying for a licence, this court will certainly interpose by indictment or information where malice is evident. I do not say but the party may have a remedy by action grounded on the injury arising from an abuse of the special authority; but the justices can never be exposed to any punishment for error of judgment only, or for any opinion about the expediency

diency of licensing or not licensing certain publick houses, or about the characters of those who apply for licences; for of this the justices are the most competent judges. In the present case, the justices are clear of any corruption or misbehaviour, and have proceeded upon justifiable grounds. Let the rule be discharged with costs.

What justices are prohibited from granting licences.

5. By the 26 G. 2. c. 13. No justice of the peace, being a common brewer of ale or beer, innkeeper, or distiller, or a feller of or dealer in ale or spirituous liquors, or interested in any the said trades, or being a victualler or maltster, shall be capable, or have any power to grant licences for selling ale or beer or any other liquors, but the same shall be void. *f. 11.*

Stamp.

6. And all mayors, townclerks, and other persons whom it may concern, shall make out ale licences (G) duly stamped, before the recognizance be taken; on pain of 10 l. half to the king, and half to the prosecutor, with costs. 6 G. c. 21. *f. 56.* 1 Ann. stat. 2. c. 22. *f. 6.* Which stamp shall be first of all a 12 d. stamp, by the 9 Ann. c. 23.

And then moreover a 20 s. stamp, by the 29 G. 2. c. 12. And if any person shall write any licence without such stamp, he shall forfeit 10 l. with costs, to be recovered as stamp penalties; and the licence shall not to be available till the duty shall be paid, and also a penalty of 5 l. 29 G. 2. c. 12. *f. 20.*

Licence for spirituous liquors.

7. And no person shall retail any distilled spirituous liquors, or strong waters, without a licence from the officer of excise taken out ten days before, for which he shall pay 40 s. yearly. 16 G. 2. c. 8. *f. 8.* 24 G. 2. c. 40. *f. 9.*

And such person shall be first licensed to sell ale or spirituous liquors by two or more justices of the peace. 2 G. 2. c. 28. *f. 11.* 9 G. 2. c. 23. *f. 14.* 16 G. 2. c. 8. *f. 11.* 29 G. 2. c. 12. *f. 22.*

And the justice's clerk shall have 2 s. 6 d. and no more, for such licence. 9 G. 2. c. 23. *f. 14.* 24 G. 2. c. 40. *f. 28, 29.*

Which said licence for retailing spirituous liquors, is treated of more at large under the article concerning spirituous liquors in title **Excise**.

Note, here is a *double* licence required for retailing of spirituous liquors; first, a licence from the justices to sell *ale or spirituous liquors*; and then a licence by the officers of excise to sell spirituous liquors. And therefore the ale licence ought to run so as to include spirituous liquors, or else the law should be altered in this particular. The

printed

printed alehouse licences from the stamp office endeavour to preserve the jurisdictions distinct, by excepting the several kinds of spirituous liquors by name out of the licence by the justices. But this is against the statutes; nor was it intended perhaps by the legislature, that the officers of excise should have the sole jurisdiction in this matter, but rather that the primary judgment concerning the same should be referred to the justices.

8. By the 9 *Ann. c. 23.* A wine licence is directed to be on a 4 s. stamp. And by the 30 *Geo. 2. c. 19.* A further duty is laid thereon of 5 l. for persons not having either ale or brandy licence; of 4 l. for persons having an ale licence, and no brandy licence; and of 40 s. for persons having both ale and brandy licence. Which is treated of under the title *Wine.* Wine licence.

9. By the 10 *G. 2. c. 17. f. 10, 11.* No person shall sell made wines, without a licence from two justices; for which he shall pay their clerk 2 s. 6 d. and none shall be granted but to keepers of victualling houses, inns, coffee-houses, or alehouses. Licence for made wines.

And by the 31 *G. 2. c. 31. f. 7.* The duties imposed upon wine licences by the 30 *G. 2. c. 19.* shall extend to licences for retailing sweets or made wines: As is also treated of under the title *Wine.*

IV. Recognizance, and forfeiture thereof.

1. On granting licences for keeping any common ale-house or tipling house, the person licensed shall enter into a recognizance in 10 l. with two sureties in 5 l. each, or one surety in 10 l. (H) as well against the using of unlawful games, as also for the using and maintenance of good order and rule to be had and used within the same, as by their discretion shall be thought necessary and convenient; and if such person shall be hindred thro' sickness or infirmity, or other reasonable cause to be allowed by the justices, to attend in person, they may grant the licence, on two sureties entering into such recognizance in 10 l. each. 5 & 6 *Ed. 6. c. 25. f. 1.* 26 *G. 2. c. 31. f. 1.* Recognizance.

As by their discretion shall be thought necessary and convenient] Mr Dalton observes upon these words in the statute of 5 & 6 *Ed. 6.* that the matter of the condition of the recognizance is by the statute partly referred to the discretion of the justices. And he says, in some shires the justices have agreed upon certain articles framed by their discretion, and generally to be propounded to all common ale sellers, taking their bond for performance of the same; a copy whereof

whereof they used to deliver to every of them; which manner (he says) had been allowed.

And amongst articles of this kind, he recommends to the justices care these three especially. 1. That no ale-housekeeper, upon the lord's day, should receive or suffer to remain any persons whatsoever, as their guests, in any their houses or other places, to tittle, eat, or drink; other than travellers, and such as come upon necessary business. 2. That they suffer no person whatsoever, resorting to their houses only to eat and drink, to remain there after nine of the clock in the evening in winter, and ten in summer. 3. That they suffer no person, resorting to their houses only to eat and drink, to remain tipling there above one hour, other than travellers. *Dalt. c. 176.*

To be filed at
the sessions.

2. Which said recognizance, with the condition thereof, fairly written or printed, shall forthwith, or at the next sessions at farthest, be sent or returned to the clerk of the peace, under the hands of the justices, to be by him entered or filed amongst the records. *26 G. 2. c. 31. s. 1.*

Penalty for li-
censing other-
wise,

3. And for every licence granted, without taking such recognizance; and for every such recognizance taken, and not sent or returned; every justice signing such licence, shall forfeit 3l. 6s. 8d. *5 & 6 Ed. 6. c. 25. s. 2. 26 G. 2. c. 31. s. 1.*

Which said forfeiture, for granting licences, without taking recognizances, shall be to him who shall sue, together with costs. *26 G. 2. c. 31. s. 6.* But it is not said who shall have the penalty for not returning the recognizance to the clerk of the peace, therefore that shall go to the king.

Recognizances to
be calendred.

4. And the clerk of the peace shall keep a register or calendar of all such recognizances, and shall deliver to the justices, at the meeting for granting licences, a true copy of such register or calendar. *26 G. 2. c. 31. s. 5.*

Fee for the re-
cognizance.

5. And for every recognizance shall be paid by the clerks of the justices taking such recognizances, to the clerk of the peace for filing or recording the same, and for making and delivering the copies of the register or calendar 1s. which shall be paid to the clerks of the said justices, by the persons licensed, over and above the fees payable to the said justices clerks. *26 G. 2. c. 31. s. 5.*

Process on the
recognizance.

6. By the *5 & 6 Ed. 6. c. 25. s. 3.* The justices shall have power, in their quarter-sessions, by presentment, information, or otherwise by their discretion, to enquire of all such persons as shall be admitted and allowed to keep any alehouse or tipling house, and that be so bound by recognizance,

recognizance, if they have done any act whereby they have forfeited the same recognizance, and they shall upon such presentment or information award process against every such person so presented or complained upon before them, to shew why he should not forfeit his recognizance; and shall have power to hear and determine the same, by all such ways and means, as by their discretion shall be thought good.

And by the 26 G. 2. c. 31. Any justice on complaint or information that such licensed person hath committed any act, whereby in the judgment of such justice the recognizance may be forfeited, or the condition broken, may by summons under hand and seal require such person to appear at the general or quarter sessions, then and there to answer to the matter of such complaint or information; and also may bind the complainant, or any other person, in a recognizance to appear and give evidence; and the sessions may direct the jury which shall there attend for the trial of traverses, or some other jury of twelve honest and substantial men, to be then and there impanelled by the sheriff without fee, to inquire thereof; and if the jury find that such person hath done any act whereby the recognizance is broken, such act being specified in such complaint or information, the court may adjudge him guilty; which verdict and adjudication shall be final; and thereupon the court shall order the recognizance to be attached into the exchequer, to be levied to his majesty's use; and the said person shall be disabled to sell any ale, beer, cyder, perry, or spirituous liquors for three years, and any licence granted to him for such term shall be void, *f. 7.* Provided that the justices, at the request of the prosecutor, or of the party complained of, or either of his sureties, may adjourn the trial to the then next sessions. *f. 8.*

And if any person shall be disabled, by conviction, to sell ale, beer, cyder or perry; he shall by the same conviction be disabled to sell any spirituous liquors, any licence before obtained for that purpose notwithstanding; and every licence granted to him for selling ale, beer, cyder, perry, or spirituous liquors, shall be void; and if he shall sell during such disability, he shall be punished as for selling without licence; and a certificate from the clerk of the peace (which he shall grant without fee) of such conviction shall be legal evidence. *id. f. 11.*

Which Conviction shall be in this or the like Form:

Middlesex. **A.** *O. is convicted on his own confession (or, on the oath of——) of having sold ale, beer, or other liquors, in the parish of—— in this county, on the —— day of —— after being disabled to sell the same. This is the first, second, or third conviction. Given under my hand and seal this —— day of ——*

Which said conviction shall be certified to the next sessions, to be filed amongst the records. *f. 13.*

V. To what places the licence shall extend.

Licence restrained to the place.

1. No licence shall intitle any person to keep an alehouse in any other place, than that in which it was first kept by virtue of such licence; and such licence with regard to all other places shall be void. *26 G. 2. c. 31. f. 3.*

Person dying or removing.

2. And if any licensed person shall die or remove out of his house so licensed; his executors, administrators, or assigns who shall be possessed of such house, or the occupier thereof, may continue during the residue of the term, without any new licence or certificate. *26 G. 2. c. 31. f. 3. 29 G. 2. c. 12. f. 23.*

And if any alehouse or victualling house shall become empty or unoccupied after the general day for licensing (the occupier whereof was duly licensed the year preceding); two justices at a petty sessions may grant a licence to any new tenant or occupier till the next general licensing day, obtaining first a certificate as before mentioned. *29 G. 2. c. 12. f. 24.*

VI. How long the licence shall continue in force.

The licence granted at the general licensing day shall be made for one year only, to commence on Sept. 29. *26 G. 2. c. 31. f. 4.*

And the licence granted at a petty sessions in the case of a licensed house becoming unoccupied (as hath been said) shall be made until the next general licensing day. *29 G. 2. c. 12. f. 24.*

VII. Offences in brewing of ale.

1. By the *1 W. sess. 1. c. 24. f. 17.* No common brewer or retailer of beer or ale, shall use in the brewing or working thereof any melasses, coarse sugar, honey, or composition or extract of sugar; on pain of forfeiting the liquor,

Quor, and also 100*l.* half to the king, and half to him that shall sue in six months.

2. And by the 10 & 11 *W. c.* 21. *f.* 34. If any common brewer or retailer of beer or ale, shall use any melasses, coarse sugar, honey, or composition or extract of sugar, in the brewing, making, or working of any ale or beer; or if any common brewer shall receive into his custody any quantity of any the said materials exceeding ten pounds, he shall forfeit 100*l.* to be recovered and mitigated as by the laws of excise; and the Servant or other assisting therein, shall forfeit 20*l.* in like manner, and in default of payment shall be imprisoned three months.

3. And by 9 *Ann. c.* 12. No common brewer, innkeeper, or victualler, shall use any broom, wormwood, or any other bitter ingredient (to serve instead of hops) in any beer or ale for sale (except infusing the same, after it is brewed and tunned, to make broom or wormwood ale or beer;) on pain of 20*l.* half to the king, and half to the prosecutor, to be levied as by the laws of excise, *f.* 24, 26.

4. And by 12 *Ann. stat.* 1. *c.* 2. No common brewer, or retailer of beer or ale, shall use any sugar, honey, foreign grains, Guinea pepper, essentia bine, coculus indiac, or any unwholsome ingredients in the brewing of beer or ale, or mix any of them therewith, on pain of 20*l.* to be recovered and mitigated as by the laws of excise, half to the king, and half to him that shall sue. *f.* 32.

VIII. Innkeepers obliged to receive guests.

If one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendring him a reasonable price for the same; he is not only liable to render damages for the injury, in an action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the king. 1 *Harv.* 225.

Also it is said, that he may be compelled by the constable of the town, or by a justice of the peace, to receive and entertain such a person as his guest; and that it is no way material whether he hath a sign before his door or not, if he make it his common business to entertain passengers. But how the officer may compel him may be a question: It seemeth that all the officer can do, is either to cause such alehousekeeper to be suppressed, or else to present such offence at the assizes or sessions, that so such offender may be thereupon indicted. *Dalt. c.* 7.

IX. Soldiers quartered in alehouses.

By the yearly acts against mutiny and desertion, the constable, and in his default, a justice of the peace, may quarter soldiers in inns, livery stables, alehouses, and victualling houses; as is set forth more at large in title *Soldiers*.

X. Concerning ale vessels, and the measure of ale.

Justices to rate
the price of
vessels.

1. The justices in *Easter* sessions yearly (and mayors in corporations) shall rate the price of all barrels, kilderkins, firkins, and other vessels to be sold for ale or beer to be uttered therein: And if any cooper shall not sell the same according to such rate, he shall forfeit 3*s.* 4*d.* half to the king, and half to him that shall sue. 8 *El. c.* 9.

Barrel, what.

2. Every barrel of beer, within the bills of mortality, shall be 36 gallons, and the barrel of ale 32 gallons; and in all other places, 34 gallons shall be reckoned for a barrel of beer or ale. 12 *C. 2. c.* 24. *f.* 34. 1 *W. st.* 1. *c.* 24. *f.* 5.

Quarts and pints
to be marked.

3. By 11 & 12 *W. c.* 15. which is required to be given in charge at the sessions to the grand jury, it is enacted, that all innkeepers, alehousekeepers, sutlers, victuallers and other retailers of ale or beer, and every person keeping any publick house, and retailing and selling ale or beer, shall retail and sell the same in and from their houses, by a full ale quart or ale pint, according to the standard of the exchequer, in a vessel made of wood, earth, glass, horn, leather, pewter, or of some other good and wholesome metal, made and sized to the standard, and signed, stamped, or marked to be of the content of the said ale quart or ale pint, according to the said standard, either from the exchequer, or from some city, town corporate, borough, or market town where a standard ale quart or pint, made from the said standard, shall be kept for that purpose; and shall not retail and utter any ale or beer, in any other vessel not signed and marked; on pain of forfeiting not above 40*s.* nor under 10*s.* for every offence, half to the poor, and half to him that shall prosecute or sue for the same, to be recovered before one justice, by the oath of one witness, and to be levied by warrant of distress, rendring the overplus, deducting thereout the reasonable charges. *f.* 1, 6. The prosecution to be within thirty days. *f.* 6.

And moreover he shall not detain any goods for the reckoning, but shall be left to his action at law. *f.* 2.

But it is not necessary that beer or ale sold to be spent out of the house, be carried away in standard measures; but it is sufficient if it be measured out by the standard. *f. 7.*

4. And every mayor, or chief officer of every city, town corporate, borough, or market town, shall on request to him made, cause all ale quarts and ale pints, made of wood, earth, glass, horn, leather, pewter, or other good and wholesome metal, which shall be brought to him, to be measured and sized with the standard in his custody, and shall then cause the same, and every of them, to be plainly and apparently signed, stamped, and marked with W R and a crown, for which they shall not receive above one farthing for each measure; on pain of 5*l.* to be recovered as aforesaid, and he shall also pay to the party grieved treble damages with costs, by action at law. 11 & 12 W. c. 15. *f. 5.* Who shall mark them.

Note, Most of the books do set forth that the sub-commissioners or collectors of excise shall procure standard quarts and pints out of the exchequer, for every market town; but this was only required of them before June 24, 1700, and not since. *f. 3.*

5. An indictment will lie for selling ale in pots unsealed, altho' the statute appoints another method of proceeding; because measures are by the common law, and the statutes only direct the manner of ascertaining them. *Black. 10.* Indictment.

But in such case, the indictment must not be upon the statute, but at the common law; and the offence ought to be laid, not for selling in pots unsealed, but in pots wanting measure.

XI. Conspiring to enhance the price of ale.

By the 2 & 3 Ed. 6. c. 15. If any brewers shall conspire to sell their victuals but at certain prices; they shall, on conviction in the sessions or leet, by witness, confession, or otherwise, forfeit 10*l.* to the king for the first offence, and if not paid in six days, they shall be imprisoned 20 days; for the second offence, 20*l.* in like manner, or the pillory; for the third offence, 40*l.* in like manner, or the pillory, loss of an ear, and to become infamous. But by the 2 G. 3. c. 14. No brewer, innkeeper, victualler, or other retailer of strong beer or ale, shall be sued or molested by indictment, information, popular action, or otherwise, for advancing the price of strong beer or ale, in a reasonable degree.

XII. Selling in vessels of plate.

By 7 & 8 W. c. 19. intituled, An act to encourage the bringing plate into the mint to be coined, and for the further remedying the ill state of the coin of the kingdom; it is enacted, that from and after *May 4, 1696*, no person keeping any inn, tavern, alehouse, or victualling house, or selling wine, ale, beer, or any other liquors by retale, shall publickly use, or expose to be used in his house, any wrought or manufactured plate whatsoever, or any utensil or vessel thereof (except spoons) under the penalty of forfeiting the same, or the value thereof with costs, to him who shall sue.

I have recited the title of the act, that the whole may appear together; because, as the general practice seemeth now to be allowed to the contrary, perhaps it may be thought that this clause is obsolete, as having been intended only to encourage the coinage at that time, when there was great scarcity of money: But how far this may be urged on an action brought, I presume not to say.

XIII. Innkeeper suffering tipling.

If any innkeeper, victualler, or alehousekeeper, or tavern-keeper, keeping an inn or victualling house, do suffer any person to continue drinking or tipling therein (except such as shall be invited by any traveller, and shall accompany him only during his necessary abode there; and except labouring and handicraftsmen in cities, towns corporate, and market towns, upon the usual working days, for one hour at dinner time, to take their diet in an alehouse; and except labourers and workmen, which for the following of their work by the day or by the great, in any city, town corporate, market town or village, shall for the time of their said continuing in work there, sojourn, lodge or victual in any inn, alehouse or other victualling house; and except for urgent and necessary occasions to be allowed by two justices); he shall, on conviction thereof before the mayor, or a justice of the peace, on view, or confession, or oath of one witness, forfeit 10s. to the poor. 1 J. c. 9. s. 2. 1 C. c. 4. 21 J. c. 7.

The same to be levied by the constables or churchwardens by way of distress; and for default of satisfaction in six days, the distress to be appraised and sold, rendering the overplus; and for want of sufficient distress, the party offending to be by such mayor or justice committed

to the common gaol, there to remain until the penalty be truly paid. 1 J. c. 9. f. 3.

And if the constables or churchwardens do neglect their duty in levying, or do not levy the penalties; or in default of distress, do neglect to certify the default, by the space of 20 days, to such mayor or justice; every person so offending shall forfeit 40s. to the poor, to be levied by way of distress by warrant from such mayor or justice; the distress to be detained six days; in which time if payment be not made, the goods to be appraised and sold, returning the overplus; for want of sufficient distress, the constable or churchwarden so offending, to be by such mayor or justice committed to the common gaol, there to remain until the penalty be truly paid. 1 J. c. 9. f. 4.

And moreover such alehousekeeper shall be disabled, for the space of three years, to keep any such alehouse. 21 J. c. 7.

And also, the said offence may be inquired of and presented before justices of assize, justices of the peace in their sessions, mayors in corporations, and in theleet; and thereupon such due proceeding shall be had for the conviction, as in such like cases upon any indictment or presentment is used. 4 J. c. 5. f. 5.

And all constables, churchwardens, aleconners and siders, shall in their several oaths incident to their offices, be charged to present the said offence. 4 J. c. 5. f. 7.

XIV. Persons guilty of tippling.

1. If any person (unless those excepted under the foregoing head, by 1 J. c. 9.) shall continue drinking or tippling, in any inn, victualling house, or alehouse, or any tavern keeping an inn or victualling house; he shall, on conviction thereof before the mayor or a justice of the peace, on view, confession, or oath of one witness, forfeit for every offence 3s. 4d. to be paid within one week next after the conviction, to the churchwardens, who shall be accountable for the same to the use of the poor: And if he shall refuse or neglect to pay the same, it shall be levied by distress: And if he be not able to pay the forfeiture, then the mayor, justice, or court where the conviction shall be, may punish the offender, by setting him in the stocks for every offence by the space of four hours. 4 J. c. 5. f. 4. 1 J. c. 9. 21 J. c. 7. 1 C. c. 4.

The said offence may also be inquired of and presented, before justices of assize, justices of the peace in sessions, mayors, and in theleet; and proceeding shall be had there-

upon for the conviction, as upon indictment or presentment. 4 *J. c. 5. f. 5.*

The offender to be presented, indicted, or convicted in six months. 4 *J. c. 5. f. 11.*

And all constables, churchwardens, aleconners, and sidemen, shall in their several oaths incident to their offices, be charged to present the said offence. 21 *J. c. 7. f. 5.*

Alehousekeeper
guilty of tipling. 2. And if any alehousekeeper shall be convicted of the said offence, he shall moreover for the space of three years be disabled to keep any such alehouse. 7 *J. c. 10. 21 J. c. 7.*

XV. Concerning drunkenness.

Drunkenness no
excuse. 1. Drunkenness excuseth no crime; but he who is guilty of any crime whatever, thro' his voluntary drunkenness, shall be punished for it as much as if he had been sober. 1 *How. 2.*

Spiritual censure. 2. If any offend their brethren by drunkenness, the churchwardens and sidemen shall present the same to the ordinary, that they may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed. *Can. 109.*

And all constables, churchwardens, aleconners, and sidemen, shall be sworn to present the offence of drunkenness. 4 *J. c. 5. f. 7.*

Penalty for the
offence. 3. Every person who shall be drunk, and thereof shall be convicted (I. K.) before one justice, or mayor, on view, confession, or oath of one witness, shall forfeit for the first offence 5s. to be paid within one week after conviction, to the churchwardens, (L) who shall be accountable for the same to the use of the poor; and if he shall refuse or neglect to pay the same as aforesaid, it shall be levied by distress; (M) and if the offender be not able (N) to pay the said sum of 5s. he shall be committed to the stocks, (O) there to remain by the space of six hours. 4 *J. c. 5. f. 2. 21 J. c. 7. f. 1, 3.*

And if any constable, or other inferior officer to whom that shall be given in charge by the precept of any mayor or justice, do neglect the due correction of the offender, or the due levying of the penalties where distress may be had; every person so offending shall forfeit 10s. to be levied by distress, by any other person having warrant from any mayor, justice or court. where any such conviction shall be, to be paid to the churchwardens, who shall account for

for the same, to the use of the poor where the offence shall be committed. 4 *J. c. 5. f. 3.*

4. And if any person once convicted of drunkenness, Second offence, shall after that be again convicted of the like offence, he shall be bounden with two sureties in a recognizance or obligation of 10 l. with condition to be from thenceforth of good behaviour. 4 *J. c. 5. f. 6.* 21 *J. c. 7. f. 3.*

To be of good behaviour] Lord Hale, speaking of the statute of 34 *Ed. 3. c. 1.* which gave justices power to bind malefactors to the good behaviour; generally, without any time limited, says, that it is not meant that the same shall be perpetual, but in the nature of bail, *viz.* to appear at such a day at their sessions, and in the mean time to be of good behaviour. 2 *H. H. 136.*

5. The said offence may also be inquired of and presented before justices of assize, justices of the peace in their sessions, mayors, and in the lect; and thereupon process shall be had for the conviction, as upon indictment or presentment. 4 *J. c. 5. f. 5.* Who may inquire thereof.

6. But the offender shall be presented, indicted or convicted in six months. 4 *J. c. 5. f. 11.* In what time.

7. It is also provided, that this act shall not abridge the ecclesiastical jurisdiction. 4 *J. c. 5. f. 8.* None to be twice punished for the same offence.

But when the offender hath been once punished, by any the ways before mentioned, he shall not be punished again by any other way or means. *f. 9.*

8. If any alehousekeeper shall be convicted of being drunk; he shall, besides the penalties above mentioned, be utterly disabled to keep any such alehouse, for the space of three years next ensuing the conviction. 7 *J. c. 10. 1 C. c. 4.* Alehousekeeper drunk.

9. Every person in his majesty's pay in the navy, being Navy. guilty of drunkenness, shall incur such punishment as a court martial shall think fit to impose. 22 *G. 2. c. 33. Art. 2.*

XVI. Detaining goods for the reckoning.

1. An innkeeper may detain the person of the guest who eats, or the horse which eats, till payment. And this he may do, without any agreement for that purpose. For men that get their livelihood by entertainment of others, cannot annex such disobliging conditions, that they shall retain the party's property in case of nonpayment; nor make such disadvantageous and impudent a supposition, that they shall not be paid. And therefore the law annexes such a condition, without the express agreement of the parties, *Bac. Abr. Inns. D.* General power of detaining.

For it would be hard to oblige him to sue for every little debt; and a greater hardship, that he might not be able to find him who was his guest. *id.*

Horse to be detained only for his own meat.

2. But an horse committed to an innkeeper, may be detained only for his own meat, and not for the meat of the guest, or of any other horse; for the chattels in such case are only in the custody of the law for the debt that arises from the thing itself, and not for any other debt due from the same party; for the law is open for all such debts, and doth not admit private persons to take reprisals. *Bac. Abr. Inns. D. 1 Bulst. 207.*

Reckoning to be in particulars; and vessels to be sealed.

3. Also, if any innkeeper, alehousekeeper, victualler, or futler, in giving any account or reckoning in writing, or otherwise, shall refuse or deny to give in the particular number of quarts or pints, or shall sell in measures unmarked; it shall not be lawful for him, for default of payment of such reckoning, to detain any goods or other thing, belonging to the person or persons from whom such reckoning shall be due, but he shall be left to his action at the law for the same, any custom or usage to the contrary notwithstanding. *11 & 12 W. c. 15. s. 2.*

Goods suffered to be taken away, not to be retaken.

4. In like manner if the innkeeper gives credit to the party for that time, and lets him go without payment; then he hath waived the benefit of the custom, and must rely on his other agreement. *8 Mod. 172.*

Goods seized, not to be used.

5. An innkeeper that detains a horse for his meat, cannot use him; because he detains him as in custody of the law: and by consequence, the detention must be in the nature of a distress, which cannot be used by the distrainer. *Bac. Abr. Inns. D.*

Whether they may be sold.

6. But by the custom of *London* and of *Exeter*, if a man commit an horse to an innkeeper, and he eat out his price; the innkeeper may take him as his own, upon the reasonable appraisement of four of his neighbours: which was, it seems, a custom arising from the abundance of traffick with strangers, that could not be known, to charge them with the action. But the innkeeper hath no power to sell the horse, by the general custom of the realm. *Bac. Abr. Inns. D.*

So in the case of *Jones and Pearle, E. 9 G.* In trover for three horses, the defendant pleaded that he kept a publick inn at *Glastenbury*, and that the plaintiff was a carrier, and used to set up his horses there; and 36l. being due to him for keeping the horses, which was more than they were worth, he detained and sold them, as well he might: But on demurrer, judgment was given for the plaintiff; an innkeeper having no power to sell horses, except

cept by special custom, as in the city of *London*. And besides, when the horses had been once out, the power of detaining them for what was due before, did not subsist at their coming in again. *Str.* 557.

XVII. Goods of a guest stolen out of an inn.

1. Inns were allowed for the benefit of travellers, who have certain privileges whilst they are in their journeys, and are in a more peculiar manner protected by the law: it is for this reason, that the innkeeper shall answer for those things which are stolen within the inn, tho' not delivered to him to keep, and tho' he was not acquainted that the guests brought the goods to the inn; for it shall be intended to be thro' his negligence, or occasioned by the fault of him or his servants. *8 Co. Caley's case.* Innkeeper answerable for goods stolen.

So if he puts a horse to pasture, without the direction of his guest, and the horse is stolen, he must make satisfaction. (But otherwise, if with his direction.) *id.*

In like manner, if an innkeeper bids his guest take the key of his chamber and lock the door, and tells him that he will not take the charge of the goods; yet if they are stolen, he shall be answerable: because he is charged by law for all things which come to his inn: and he cannot discharge himself by such or the like words. *Dalt. c. 56. Black. 169.*

2. *Holt C. J.* doubted whether a man is a guest by setting up his horse at an inn, tho' he never went into the inn himself; but the other three justices held, that such person is a guest by leaving his horse, as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain; otherwise if he had left a trunk, or a dead thing. *1 Salk. 388.* Who shall be deemed a guest in this respect.

So if a man comes to an inn with a hamper, in which he hath certain goods (to wit, hats, as the case was), and departs leaving it with the host, and two days after comes again, whereas in the time of his absence this was stolen; he shall not have any action against the host, because he was not a guest at the time of the stealing, and the host had no benefit by the keeping thereof, and therefore shall not be charged for the loss thereof in his absence. *1 Roll's Abr. 2.*

If an attorney hires a chamber in an inn for a whole term, the host is not chargeable with any robbery in it, because the party is as it were a lessee. *Mto. 877.*

If one comes to an inn, and makes a previous contract for lodging for a set time, and doth not eat or drink there; he is no guest, but a lodger, and so not under the innkeeper's

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keeper's protection: but if he eats and drinks, or pays for his diet there, it is otherwise. 12 Mod. 255.

Soldiers billeted are guests. Clayt. 97.

XVIII. Guests stealing goods.

A guest in a common inn, arising in the night time, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony, altho' there was no trespass in the taking of them (which yet is generally required in cases of felony.) Dalt. c. 40.

NOTE, The universities are generally excepted out of these acts concerning alehouses.

A. Information and complaint for selling ale without licence; on the 5 G. 3. c. 46.

Westmorland. **B**E it remembred, that this——day of ——in the——year of the reign of his majesty king George the third that now is, A. I. gentleman, in his proper person, as well for his said majesty as for himself, exhibiteth to me J. P. esquire, one of his said majesty's justices of the peace in and for the said county, a complaint and information, and thereby informeth me, that on the——day of——now last past, and at several times between the said——day of——and the time of exhibiting this information and complaint, one A. O. of——in the county aforesaid, yeoman, at——aforesaid in the county aforesaid, did sell ale and beer, and other exciseable liquors, by retail, without being duly licensed so to do; whereby the said A. O. hath forfeited the sum of 40s. together with the costs and expences of convicting the said A. O. for the said offence; and that A. W. of——in the said county, yeoman, is a material witness to be examined concerning the premises: And thereupon the said A. I. who as well for his said majesty as for himself exhibiteth this information, prayeth judgment of me the said justice in the premises, that he may have one moiety of the said sum of 40s. and also the costs and expences of such conviction as aforesaid, according to the form of the statute in that case made; and that the said A. O. may be summoned to answer the premises, and the said A. W. to testify his knowledge therein.

A. I.

Before me the justice
aforesaid,

J. P.

B. Summons

B. Summons of a person for selling ale without licence, and also of a witness; on the 5 G. 3. c. 46.

Westmorland. } To the constable of——in the said county.

WHEREAS a complaint and information hath been this day exhibited before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, by A. I. of——gentleman, setting forth, that on the——day of——now last past, and at several times between the said——day of——and the time of exhibiting the said information and complaint, one A. O. of——in the county aforesaid, yeoman, at——aforesaid in the county aforesaid, did sell ale and beer, and other exciseable liquors, by retail, without being duly licensed so to do; and that A. W. of——in the said county, yeoman, is a material witness to be examined concerning the premises: These are therefore to require you forthwith to summon the said A. O. to appear before me at——in the said county, on——the——day of——at the hour of——to answer to the matter so complained and informed of against him; and to summon also the said A. W. to appear before me at the same time and place, to testify his knowledge in the premises. And be you then there to certify what you shall have done in the execution hereof. Herein fail you not. Given under my hand and seal, this——day of——in the——year——.

Note, a separate summons for a witness, in behalf of either of the parties, may easily be extracted from the premises, *mutatis mutandis*.

C. Conviction for selling ale without licence; on the 5 G. 3. c. 46. specially directed by the statute.

Middlesex. **B**E it remembered, that on this——day of——in the year——A. O. of——was duly convicted before me J. P. esquire, one of his majesty's justices of the peace for the county of M. for selling ale or beer, or other exciseable liquors (as the case shall be) without being duly licensed so to do, according to the statutes in such case made and provided, whereby he has forfeited the sum of——this being the first, second, or third offence (as the case shall be),

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besides the costs and expences of this conviction; which costs and expences I the said justice of the peace do hereby ascertain and assess at the sum of———pursuant to the statute in such case made and provided. Given under my hand and seal, the day and year above written.

D. Commitment on non-payment of the penalty for selling ale without licence; on the 5 G. 3. c. 46.

Westmorland. { To the constable of———in the said county, and to the keeper of his majesty's gaol at———in the said county.

WHEREAS A. O. of———in the county aforesaid, yeoman, was on the———day of———duly convicted before me J. P. esquire, one of his said majesty's justices of the peace in and for the said county, for selling ale [beer, or other exciseable liquors, as the case shall be] without being duly licensed so to do, according to the statutes in such case made and provided; whereby he hath forfeited the sum of forty shillings (this being the first offence), besides the costs and expences of his conviction, which expences I have ascertained and assessed at the sum of———pursuant to the statute in such case made: And whereas the said A. O. on the said———day of———had notice of the said conviction, and hath refused or neglected to pay, and hath not paid, the said several sums of forty shillings and———: I do therefore hereby command you the said constable, to apprehend him the said A. O. and him to convey to the said gaol at———aforesaid, and deliver him to the said keeper thereof, together with this precept: And I do hereby command you the said keeper of the said gaol, to receive into your custody in the said gaol him the said A. O. and him there safely to keep for the space of one month, unless he shall sooner pay the said several sums of forty shillings and———, and also the costs, charges, and expences of executing the said conviction. Given under my hand and seal, the———day of———in the year———.

The like will do for the second, third, or other subsequent offence, *mutatis mutandis*.

E. F. Precept to the high constable to issue warrants to the petty constables, to summon alehousekeepers to be licensed; on 5 & 6 Ed. 6. c. 25. 2 G. 2. c. 28. and 26 G. 2. c. 31.

Westmorland. { To John Bowness, gentleman, high constable of the *East Ward* within the said county.

IN pursuance of the statutes in that case made, these are to require you, on sight thereof, to issue out your warrants to all petty constables belonging to the several constablenicks within your said ward, in the form, or to the effect hereafter following. Given under our hands and seals the _____ day of _____.

L. P.
K. P.

The form of the warrant as above directed:

Westmorland, { To the constables of _____
East Ward.

BY virtue of a warrant from his majesty's justices of the peace acting within the said ward to me directed, you are hereby required to give notice to all licensed innkeepers and alehousekeepers within your constablenick, and also to all persons unlicensed (so far as the same shall come to your knowledge) who do intend to offer themselves to be licensed at the next general meeting of the said justices for that purpose, that they do personally appear before the said justices at _____ on the _____ day of September next, at the hour of _____ in the forenoon of the same day, to take or renew their licences for the year ensuing; and also to give them notice, that every person then and there to be licensed, must personally enter into a recognizance in the sum of 10*l.* together with two sureties in 5*l.* each, or one surety in 10*l.* that they will not use or suffer any unlawful games, and that they will keep good order and rule within their respective houses and other places; and if any shall be hindered by sickness, or other reasonable cause to be allowed by the said justices, that he must procure two sureties then and there to be bound in like manner in 10*l.* each.

And unto such persons as have not been licensed for the year preceding, you are further to give notice, that no licence will be granted to any of them, unless he shall also, at the same time and place, produce a certificate under the hands of the minister

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and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders of the place where he inhabiteth, setting forth that he is of good fame, and of sober life and conversation.

And you are to make a return to the said justices, at the same time and place, in writing under your hand, containing the names of all such persons as you shall have summoned so to appear before them as is aforesaid, together with their dwelling places, and the signs by which their houses are known.

Hereof fail not. Given under my hand at Raisbeck in the said county the ——— day of ——— in the year of our lord ———.

John Bowness, high constable.

G. Licence to keep an alehouse; on the 5 & 6 Ed. 6. c. 25. 2 G. 2. c. 28. and 26 G. 2. c. 31.

Westmorland, **A**T a general meeting of his majesty's justices of the peace for the said county, acting within the division of the East Ward aforesaid in the county aforesaid, holden at ——— in and for the said division, for licensing persons to keep common inns and alehouses the ——— day of September in the ——— year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth; and in the year of our lord ———.

We his majesty's justices of the peace for the said county, whose hands and seals are hereunto set (whereof one is of the quorum) assembled at the said general meeting, do allow and license A. B. yeoman, at the sign of ——— in ——— within the division and county aforesaid, to keep a common alehouse, or victualling house, and to utter and sell victuals, beer, ale, cyder, and other exciseable liquors, to be drank in the same house wherein he now dwelleth, and not elsewhere, for one whole year from the 29th day of this present month of September, and no longer: So as the true assize in bread, beer, ale, and other liquors, hereby allowed to be sold, be duly kept; and no unlawful game or games, drunkenness, or any other disorder be suffered in his house, yard, garden, or backside; but that good order and rule be maintained and kept therein, according to the laws of this realm in that behalf made. Given under our hands and seals, the day and year first above written.

If he hath not been licensed the year before, then these words must be inserted, ——— (A certificate under the hands of ——— having

—— having been first produced unto us, setting forth that the said—— is of good fame, and of sober life and conversation.)

But if such person hath been licensed the year before, this certificate is not required; and therefore to insert the same in all licences is absurd; and, if executed by the justices in such form, must be in many instances not true.

H. Recognizance of an alehousekeeper; on 5 & 6 Ed. 6. c. 25. and 26 G. 2. c. 31.

Westmorland. **B**E it remembered, that on the—— day of —— in the —— year of the reign of —— A. P. of —— in the county aforesaid, innkeeper, and A. S. of —— yeoman, and B. S. of —— yeoman, personally came before us —— esquires, justices of the peace for the said county, and acknowledged themselves to owe to our said sovereign lord the king, that is to say, the said A. P. the sum of 10l. and the said A. S. and B. S. the sum of 5l. each, of good and lawful money of Great Britain, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said sovereign lord the king, his heirs and successors, if the said A. P. shall make default in the condition underwritten.

THE condition of this recognizance is such, that whereas the above-bounden A. P. is licensed to keep a common inn and alehouse for one year from the 29th day of this present month of September, in the house where he now dwelleth at—— aforesaid; if he the said A. P. shall keep and maintain good order and rule, and shall suffer no disorders nor unlawful games to be used in his said house, nor in any outhouse, yard, garden, or backside, thereunto belonging, during the said term, then this recognizance shall be void.

Taken and acknowledged the day and year abovewritten, before us

J. P.
K. P.

I. Information

I. Information of drunkenness; on the 4 J. c. 5.
and 21 J. c. 7.

Westmorland. { The information of A. I. of ——— in
the county aforesaid, yeoman, exhib-
ited before me J. P. esquire, one of
his majesty's justices of the peace for
the said county, the ——— day of
——— in the year ——— who on his
oath saith,

THAT A. O. of ——— in the county aforesaid, labourer,
on the ——— day of ——— in the year aforesaid, at the
parish of ——— in the said county, was drunk; contrary to
the statutes in such case made: And thereupon he the said A. I.
prayeth that he the said A. O. may forfeit the sum of five
shillings to the use of the poor of the said parish, as by the
said statutes is required.

A. I.

Before me

J. P.

K. Summons thereupon.

Westmorland. { To the constable of ———.

FORASMUCH as information upon oath hath been
made before me J. P. esquire, one of his majesty's justices
of the peace for the said county, that A. O. of ——— in the
county aforesaid, labourer, on the ——— day of ——— in the
——— year, at the parish of ——— in the county aforesaid,
was drunk; contrary to the statutes in such case made: These
are therefore to require you to summon the said A. O. to ap-
pear before me at ——— in the said county, on ——— the
——— day of ——— to answer unto the said information, and
to shew cause why the penalty of five shillings should not be
levied on the goods of him the said A. O. for the said offence,
and be you then there to certify what you shall have done in
the premisses. Given under my hand and seal, the ———
day of ——— in the year ———.

Note, the informer in this case may be a witness, ha-
ving no share of the penalty.

And the justice may convict on his own view; and
then the information and summons are needless.

L. Warrant

L. Warrant to the churchwardens (if they are not present at the conviction, or the offender makes default by not appearing) to receive the penalty of drunkenness; by the 4 J. c. 5. and 21 J. c. 7.

Westmorland. { To the churchwardens of the parish of _____ in the said county.

FORASMUCH as A. O. of _____ in the county aforesaid, labourer, is convicted before me J. P. esquire, one of his majesty's justices of the peace for the said county, for that he the said A. O. on the _____ day of _____ in the year _____ at the parish of _____ in the said county, was drunk, contrary to the statutes in such case made; whereby he hath forfeited the sum of five shillings, to the use of the poor of the said parish; These are therefore to require you to demand and receive of and from him the said A. O. the said sum of five shillings, to be by you accounted for to the use aforesaid: And if he shall refuse or neglect to pay the same, by the space of one week after such demand made; that then you certify to me such refusal and neglect, to the end that such proceedings may be had thereupon, as to justice doth appertain. Given under my hand and seal, the _____ day of _____ in the year _____.

M. Warrant to levy the penalty of drunkenness, on non-payment; by 4 J. c. 5. 21 J. c. 7.

Westmorland. { To the constable of _____ in the said county.

WHEREAS A. O. of _____ in the parish of _____ in the county aforesaid, labourer, was on the _____ day of _____ convicted before me _____ one of his majesty's justices of the peace for the said county, for that he the said A. O. was on the _____ day of _____ drunk, at _____ aforesaid, in the parish and county aforesaid, by which he hath forfeited the sum of 5s. And whereas I the said _____ did issue my warrant on the _____ day of _____ to the churchwardens of the parish of _____ aforesaid, to demand and receive the said sum of 5s. of and from the said A. O. And whereas it duly appears to me, as well on the oath of C. W. churchwarden of the parish of _____ aforesaid, as otherwise, that they the said churchwardens did on the _____ day of _____

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duly demand the said sum of 5s. of and from the said A. O. but that he the said A. O. hath neglected to pay the same as aforesaid, and that the same is not yet paid: These are therefore to command you forthwith to levy the said sum by distraining the goods of him the said A. O. And if within the space of [six] days next after such distress by you taken, the said sum, together with reasonable charges for taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained as aforesaid, and out of the money arising by such sale, that you do pay the said sum of 5s. to the churchwardens of the said parish, for the use of the poor of the said parish, rendering to him the said A. O. the overplus upon demand, the necessary charges of taking, keeping, and selling the said distress, being first deducted. And if the said A. O. be not able to pay the said sum of 5s. and sufficient distress cannot be found whereof to levy the said sum, that you certify the same to me, together with the return of this warrant. Given under my hand and seal this——day of——.

N. Certificate by the constable of want of distress.

Westmorland. A C. constable of——in the said county, maketh oath this——day of——in the year——before me the justice within-mentioned, that he hath made diligent search for, but doth not know of, nor can find, any goods of the within-mentioned A. O. whereof to levy the within-mentioned sum of five shillings.

A. C.

Before me the said
justice,
J. P.

O. Commitment to the stocks for drunkenness, on inability to pay the penalty; on 4 J. c. 5. 21 J. c. 7.

Westmorland. { To the constable of——in the said county.

WHEREAS A. O. of——in the said county, labourer, was on the——day of——convicted before me——one of his majesty's justices of the peace for the said county, for that he the said A. O. was on the——day of——drunk at——aforesaid, in the parish of——in the said county, whereby he hath forfeited the sum of 5s. And whereas it duly appears to me, that the said A. O. is not able

able to pay the said sum of 5s. These are therefore to require you in his majesty's name, to set him the said A. O. in the stocks, there to remain for the space of six hours. Given under my hand and seal the——day of——.

Alias Capias. See **Process.**

Almanacks. See **Stamps.**

Annuities.

1. **B**Y the several acts of 4 *W. c. 3.* 5 *W. c. 5.* 5 *W. c. 20.* and 2 & 3 *An. c. 3.* Annuitants on demanding their share of annuities, in the case of survivorship on the said respective acts, shall (unless the nominee appear in person) produce a certificate of the life of such nominee, to be signed (gratis) by the minister and churchwardens where the nominee lives, on the day when the payment shall become due: Or otherwise the annuitant may make oath of the truth of such nominee's life, on the day when the payment shall become due, before a justice of the peace where such person making oath shall reside; and the justice shall make a certificate thereof; for which oath and certificate no fee shall be taken. And persons swearing falsely shall be guilty of perjury, and forging such certificate shall be guilty of forgery: And the like is enacted by the 30 *G. 2. c. 19.* with regard to the annuities payable upon that act; which annuities will determine upon the death of the nominee.

Certificate of the nominee's life.

2. By the several acts of 9 *G. c. 12.* 4 *G. 2. c. 9.* 9 *G. 2. c. 34.* and 30 *G. 2. c. 19.* If any person shall counterfeit any order to receive annuities; or power to transfer the same; or the name of the proprietor; or shall personate such proprietor; he shall be guilty of felony without benefit of clergy. The annuities upon which last act (as hath been said) will expire upon the death of the nominee.

Counterfeiting orders.

3. By the several acts of 4 *An. c. 6.* 5 *An. c. 19.* and 6 *An. c. 5.* A justice may take affidavits of the due execution of the assignment or devise of annuities, upon the said several acts respectively.

Assignment of annuities.

Apothecary. See **Physicians.**

Appeals.

Appeal, what. I. **T**HIS word has two significations in law; the one is, removing a cause from an inferior court or judge, to a superior; as from one or more justices, to the quarter sessions.

The other kind of appeal (which is the subject of this title) is a prosecution against a supposed offender, by the party's own private action; prosecuting also for the crown, in respect of the offence against the publick. 2 *Haw.* 155.

In what cases an appeal may be brought.

2. An appeal is brought in three cases; 1. By a man for a wrong to his ancestor. 2. By a wife for the death of her husband. 3. For wrong done to the appellants themselves, as in the case of robbery, rape, or maihem; but this last is refused, on account of the nicety of the pleadings, and the charge of the prosecution; and the method of indictment is now generally taken. *Wood,* b. 4. c. 5.

Within what time an appeal may be brought.

3. A person acquitted on an indictment of murder, shall not be set at liberty, but shall be recommitted, or bailed, till the year and day be past; within which time an appeal may be brought. 3 *H.* 7. c. 1.

Appeal brought before the sheriff and coroner.

4. It is certain that an appeal may be commenced before the sheriff and coroner, and removed from them into the king's bench by certiorari. 2 *Haw.* 156.

Before justices of the peace.

5. And it seems to be holden in *Fitzherbert's* abridgment, that justices of the peace have power to receive appeals; but there is much greater authority for the contrary opinion. 2 *Haw.* 156.

Person acquitted on appeal.

6. If the person appealed shall be acquitted, the appellant shall be imprisoned for a year, and restore damages to the party, and be grievously fined to the king. 13 *Ed.* 1. st. 1. c. 12. That is, if the appeal shall appear to the court to have been malicious. 2 *Haw.* 198.

Pardon.

7. Forasmuch as an appeal is the suit of the party, as well as of the king, hence it is that the king cannot pardon an offender found guilty upon an appeal, as he may when found guilty upon an indictment; for in such case he can only pardon for himself, but not for the party. 2 *Haw.* 155.

Apples and pears.

WHEREAS apples and pears are frequently sold by measure, commonly called water-measure, the contents whereof are very uncertain; therefore for the future, the said measure shall be round, and in diameter eighteen inches and an half within the hoop, and eight inches deep; and so in proportion: And every measure, commonly called water-measure, by which apples and pears are sold, shall be heaped as usually: And whosoever shall sell or buy any apples or pears by any other measure, shall forfeit 10*s.* half to the informer, and half to the poor, on conviction on the oath of one witness, before one justice, (or mayor), to be levied by the petty constable by warrant of the said justice, by distress and sale. 1 *Ann. st. 1. c. 15. s. 1.*

But this shall not extend to any measures sealed and allowed by the fruiterers company in London. *s. 2.*

Concerning the robbing of orchards, see title **Wood**,

Apprehending offenders. See **Arrest**.

Apprentices.

Concerning the settlement of apprentices, see title **Poor**.

- I. Who may take apprentices.*
- II. Who are compellable to be bound apprentices.*
- III. Binding.*
- IV. Binding of poor apprentices.*
- V. Money given to bind out poor apprentices.*
- VI. Binding poor apprentices to the sea service.*
- VII. Differences between the master and apprentice.*
- VIII. Apprentice stealing his master's goods.*
- IX. Inticing away an apprentice.*
- X. Assigning apprentices.*
- XI. Master*

XI. Master dying.

XII. Apprentices setting up their trades.

I. Who may take apprentices.

In husbandry.

1. **E**VERY person being an householder, and having and using half a plough-land in tillage, may take any apprentice above the age of ten years, and under eighteen, to serve in husbandry till twenty-one at the least, or till twenty-four as the parties can agree. 5 *El. c. 4. §. 25.*

In trades in towns corporate.

2. Every person being an householder, and twenty-four years old at the least, dwelling in any city or town corporate, and exercising any art, mystery, or manual occupation there, may retain the son of any freeman, not occupying husbandry, nor being a labourer, and inhabiting in the same, or in any other city or town corporate, to serve and be bound as an apprentice, after the custom and order of the city of *London*, for seven years at the least, so as such apprenticeship do not expire before the apprentice shall be twenty-four years of age. 5 *El. c. 4. §. 26.*

But no person dwelling in any city or town corporate, being a merchant, mercer, draper, goldsmith, ironmonger, imbroiderer, or clothier, shall take any apprentice except he be his son, or else that the father and mother of such apprentice shall have an estate of inheritance or freehold of 40 s. a year, to be certified under the hands and seals of three justices where the lands lie, to the mayor of that city or town corporate, and to be inrolled among the records there. *§. 27.*

And the reason of this (*Mr Dalton* says) seems to be, for that such as are to be bound apprentices in towns corporate, if their parents be of a competent livelihood, then their masters shall be not only better secured, but such apprentices also in likelihood, shall have the better means to set up their trades after their time expired. And concerning such whose parents have not 40s. a year, they are fitter to be bound apprentices to husbandry, and the like, in the country. *Dalt. c. 58.*

But by reason of the great alteration in the value of money since that time, this provision is become of little use; for an estate of 40s. a year then, was equal to more than 10*l.* a year now.

But the citizens of *London* and *Norwich* may take and have apprentices, as before this act. *§. 40.*

3. Every

3. Every person being an householder, and twenty-four years old at the least, and not occupying husbandry, nor being a labourer, dwelling in any market town not corporate, and exercising any art, mystery, or manual occupation, may have to apprentice the child or children of any other artificer, not occupying husbandry, nor being a labourer, inhabiting in the same or any other such market town in the same shire. 5 *El. c. 4. f. 28.*

In trades in market towns not corporate.

But no person dwelling in any such market town, being a merchant, mercer, draper, goldsmith, ironmonger, imbroiderer, or clothier, shall take any apprentice except he be his son, or else that his father and mother shall have an estate of inheritance or freehold of 3l. a year, to be certified under the hands and seals of three justices of the shire where the lands lie, to the head officer of such market town where such apprentice shall be taken, there to be inrolled of record. *f. 29.*

4. Any person using the art of a smith, wheelwright, ploughwright, millwright, carpenter, rough mason, plasterer, sawyer, lime-burner, brickmaker, bricklayer, tyler, slater, helier, tyle-maker, linen-weaver, turner, cooper, miller, earthen potter, woollen weaver weaving household cloth only, fuller otherwise called tucker or walker, burner of oare and woad ashes, thatcher or singler, wheresoever he shall dwell, may take the son of any person as apprentice, albeit his parents have no land. 5 *El. c. 4. f. 30.*

5. Every owner of a ship or vessel, and every householder exercising the trade of the seas by fishing or otherwise, and every gunner commonly called a canoneer, and every shipwright may take apprentices for ten years or under; and every apprentice so taken, being above seven years of age, shall be by the same covenants bound, ordered and used to all intents, according to the custom of *London*, so that the covenant or bond of apprenticeship be made by writing indented, and inrolled in the town where the apprentice shall be inhabiting, if it be a town corporate; if not, then in the next town corporate: For which inrollment shall be paid not above 12d. 5 *El. c. 5. f. 12.*

Seamen.

6. Every person that shall have three apprentices in any the crafts of a clothmaker, fuller, sheerman, weaver, taylor, or shoemaker, shall keep one journeyman; and for every other apprentice above three, one other journeyman, on pain of 10l. half to the king, and half to him that shall sue in the sessions or other court of record; or if it is in a town corporate, then to be applied as by the charter. 5 *El. c. 4. f. 33.*

Nam: -
- - - - -

No hatmaker shall have above two apprentices at one time, nor those for any less term than seven years, on pain of 5*l.* a month, half to the king, and half to him that shall sue in any court of record: But this not to extend to his own son, in his own house, so as he be bound by indenture for seven years, and his term not to expire before he be twenty-two years of age. 1 *J. c.* 17. *f.* 3, 5.

Weavers of stuffs in *Norfolk* and *Norwich*, that shall employ two apprentices, shall also employ two journey-men; and no master shall have above two apprentices, or any week boy, to weave in the said trade; on pain of 5*l.* a month to the king. 13 & 14 *C. 2. c.* 5. *f.* 18.

II. Who are compellable to be bound apprentices.

Who shall be bound.

1. If any person shall be required by any householder, using half a ploughland at least in tillage, to be an apprentice and to serve in husbandry, or in any other art, military, or science before expressed, and shall refuse so to do, then on complaint of such housekeeper to one justice (or head officer) he shall send for the person refusing; and if he shall think the said person meet to serve, and such person refuse to be bound, he may commit him to ward, there to remain until he be contented, and will be bound. 5 *El. c.* 4. *f.* 35.

At what age.

2. But no person shall be bound to enter into any apprenticeship, other than such as be under the age of twenty-one years. 5 *El. c.* 4. *f.* 36.

Upon the whole, the aforesaid directions about the value of the parents estate, and such like, are become entirely obsolete, and of no use, and therefore had better be repealed. The restrictions were originally intended (as appears by the statute, 9 *H. 4. c.* 17.) for the encouragement of husbandry, by reason of the scarcity of labourers in ancient time. And this statute of the 5 *Eliz.* is only a re-enacting, as it were, of former statutes; and expresseth, that any person being an householder may take apprentice the son of any freeman, *not occupying husbandry, nor being a labourer.*

III. Binding.

Binding to be by deed.

1. One cannot be bound an Apprentice without deed. 1 *Salk.* 68.

2. And

2. And by the 5 *El. c. 4.* it must be by deed indented. And indented.
f. 25.

M. 1 G. 2. Smith and Birch. An action was brought against the defendant, for enticing away and detaining the plaintiff's apprentice, who had agreed by writing to serve the plaintiff for seven years. Upon Evidence it appeared, that the style of the writing began *This indenture*, &c. but in fact the parchment was not indented, but was a deed poll. On exception taken to the deed, it was insisted that the young man was not an apprentice, because he was not bound by indenture. An infant can be bound no other way than as the statute of 5 *El.* directs, which is by indenture, and nothing can make this good. The deed cannot now be indented, for that would be a forgery. Therefore unless the plaintiff shews the apprentice to be of full age at the time of signing such deed, he cannot be accounted his apprentice, and by consequence no action can lie for detaining the apprentice; neither can the plaintiff prove him to be his servant by this deed, for he has declared for an apprentice, and must prove him so to be. Therefore the plaintiff was nonsuited. *Seff. Ca. V. 1. 222.*

But with respect to settlements, it is enacted by the 31 *G. 2. c. 11.* that the apprentice may gain a settlement under such writing, altho' it shall not be indented.

3. And an apprentice must be retained by the name of And by the name of an apprentice. an apprentice expressly, otherwise he is no apprentice, tho' he be bound. *Dalt. c. 58.*

4. And all indentures, covenants, promises, and bargains, for having or taking apprentices, otherwise than by the statute of 5 *El.* shall be clearly void in the law to all intents and purposes; and every person that shall take any apprentice contrary to the said act, shall forfeit 10 l. half to the king, and half to him that shall sue in the sessions, or other court of record; or if it is in a town corporate, then to the use of such town as by the charter. *5 El. c. 4. f. 41.*

5. By the several stamp acts, the binding (except it be Stamp. of parish apprentices) shall be on a 2 s. 6 d. stamp; and the same shall not be given in evidence in any court till it be stamped, and the duties paid.

6. And by the 8 *An. c. 9.* Besides the said stamps and Additional stamp. duties, there shall be paid the duty of 6 d. for every 20 s. of every sum of 50 l. or under; and the duty of 1 s. for every 20 s. of every sum above 50 l. given with any apprentice; and proportionably for greater or lesser sums; to be paid by the master. *f. 32.*

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And where any thing, not being money, shall be given with such apprentice, the duties shall be answered for the value thereof. *f. 45.*

But this shall not extend to any apprentice, put out at the common charge of any parish or township, or out of any publick charity. *f. 40.*

And the full sum shall be inserted in the indenture in words at length, and shall bear date on the day of the execution thereof; on pain that the master shall forfeit double, half to the king, and half with full costs to him that shall sue. *f. 35.*

And no such indenture shall be given in evidence in any suit to be brought by any the parties thereunto, unless such party on whose behalf the same shall be given in evidence, do first make oath, that to the best of his knowledge, the sum therein inserted was really and truly all that was directly or indirectly to be given with such apprentice. *f. 43.*

The said indentures, within the bills, shall be brought to the head office to be stamped with a stamp for that purpose, and the duties paid within one month after date. *f. 36.*

And elsewhere shall be brought either to the head office within the bills, or to a collector of the stamp duties out of the said limits, in two months after date, and the duties thereupon shall be paid, and the indenture stamped, if it be at the said head office; otherwise such collector shall indorse on the indenture, a receipt for the duties in words at length, and subscribe his name thereto. *f. 37.*

And if it is within 50 miles of the limits of the bills of mortality, the indenture shall, within three months after date, and elsewhere within six months, be brought to the head office to be stamped. *f. 38.*

And all such indentures wherein shall not be inserted the full sum directly or indirectly given, or whereupon the duties shall not be paid, or which shall not be stamped within the time limited, shall be void, and not available in any court or place, or to any purpose whatsoever; and the apprentice shall be incapable of exercising the said trade. *f. 39.*

Moreover, by the 9 *An. c. 21.* If the master shall neglect to pay the duties within the time limited, he shall forfeit 50*l.* half to the king, and half with full costs to him who shall sue. *f. 66.*

And by the 18 *G. 2. c. 22.* If he shall neglect to pay the same as aforesaid, he shall, besides all other penalties, forfeit double duty. *f. 23, 24.*

But by the 4 G. 3. c. 23. For the relief of persons who have omitted to pay the said duties, or to insert the said sums in words at length; upon payment of the said duties on or before *Sept. 29. 1764*, the indentures shall be good.

And there is the like indemnifying clause in some act every two or three years.

And by the 20 G. 2. c. 45. If any master, having forfeited the double duty, shall pay the same, and tender the indenture to be stamped, within two years after the determination of the apprenticeship, and before suit hath been commenced for the penalties, the indenture shall be valid, and the penalties discharged. *f. 5.*

And if after the master shall have forfeited the double duty, the apprentice shall in the presence of, or by writing under his hand signed in the presence of one witness, require his master to pay the same, and the master shall not do it in three months, and such apprentice shall at any time within two years after the determination of his apprenticeship, pay the double duty, he may in three months after such payment demand of his master double the sum contracted for in the indenture, and if not paid in three months after, may recover the same by action at law, with full costs. And the apprentice immediately after payment of the said double duties (if his apprenticeship shall not be then expired) and signifying by writing under his hand, that he desires to be discharged from his apprenticeship, shall be discharged accordingly, and shall have the same benefit of the time he hath served as he would have had in case he had been assigned, or turned over to a new master. *f. 6, 7.*

And where any prosecution shall be commenced against the master for the penalties, if the apprentice shall pay the double duty at any time in two years after the end of his apprenticeship, he may thereupon exercise his trade, and the indenture shall be valid, and may be given in evidence. *f. 8.*

Finally, by the 5 G. 3. c. 46. Every chamberlain and other proper officer of every city and corporate town, and company, where any clerk or apprentice or servant obtains his freedom by servitude, shall enter in a book to be kept for that purpose, the names of all such clerks, apprentices, and servants, as shall be put out within the jurisdiction of such city or town corporate, and also the names and places of abode of the masters or mistresses, and the sums of money [but it is not said, *or other things equivalent*] given or contracted for, and the trade or profession which they are

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to learn ; and the date of the indentures : on pain of 20 l. half to the king, and half to him that shall sue in any court of record, with full costs. *f.* 18, 41.

And all printed indentures shall have the following memorandum printed under the same ; *viz.* “ The indenture, “ covenant, article, or contract must bear date the day “ it is executed ; and what money or other thing is given “ or contracted for with the clerk or apprentice, must be “ inserted in words at length ; and the duty paid to the “ stamp office, if in *London*, or within the weekly bills “ of mortality, within one month after the execution, “ and if in the country, and out of the said bills of mor- “ tality, within two months, to a distributor of the stamps “ or his substitute ; otherwise the indenture will be void, “ the master or mistress forfeit 50 l. and another penalty, “ and the apprentice be disabled to follow his trade, or “ to be made free.” And if any printer, stationer, or other person, shall sell or cause to be sold any such indenture, without such memorandum being printed under the same ; he shall forfeit 10 l. in like manner. *f.* 19.

Infant bound
suo' under age.

7. It seems clearly agreed, that by the common law infants, or persons under the age of 21 years, cannot bind themselves apprentices, in such a manner as to intitle their masters to an action of covenant, or other action, for departing their service, or other breaches of their indentures : which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on. *Bac. Abr.* Master and servant. B.

But by the statute of 5 *El. c.* 4. Forasmuch as there hath been some doubt, whether any person under 21 years of age, and bound to serve as an apprentice, in any other place than the city of *London*, shall be bound, accepted, and taken as an apprentice ; it is enacted, that every such person who shall be bound by indenture, to serve as an apprentice, in any art, science, occupation, or labour, according to this statute, albeit he be within the age of 21 years, shall be bound as amply to every intent, as if he were of full age at the time of making the indentures. *f.* 42, 43.

But this is to be understood of a compulsion by the means prescribed by the statute ; for altho' an infant may voluntarily bind himself apprentice, and if he continue apprentice for seven years, he may have the benefit to use his trade ; yet neither at the common law, nor by any words of this statute, a covenant or obligation of an infant

fant for his apprenticeship shall bind him. But if he misbehave himself, the master may correct him in his service, or complain to a justice to have him punished, according to the statute. But no remedy lieth against an infant upon such covenant. *Cro. Car.* 179.

But if his father, or other person, doth covenant for him; such covenant shall bind the father, or such other person: as in the case of *Whitley* and *Loftus*, *M.* 10 G. 2. In the indenture of apprenticeship, the father covenants to pay the apprenticeship money; the son covenants to account for his master's goods; and in the conclusion, the father and son each bind themselves for the true performance of all covenants and agreements therein. By the court: The end of binding the father was to answer wrongs done by the son, and he must answer for any; and the covenant that each did bind himself must be so, where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be taken distributively, to wit, that each of the covenantors should perform his part; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself. 8 *Mod.* 190.

But a covenant between the master and a third person, the infant not being party, maketh not an apprenticeship. 2 *Salk.* 479.

IV. Binding of poor apprentices.

1. The churchwardens and overseers, or the greater part of them, by the assent of two justices (1 *Q.*) may bind (A) any such children, whose parents they shall judge not able to maintain them, to be apprentices where they shall see convenient, till such man child shall come to the age of 24, and such woman child to the age of 21 or marriage; the same to be as effectual to all purposes, as if such child were of full age, and by indenture of covenant bound him or her self. 43 *El. c. 2. f. 5.* Power to bind;

2. And all persons, to whom the overseers shall by the 43 *El.* bind any children apprentices, may take and keep them as apprentices. 21 *J. c. 28.* 3 *C. c. 4. f. 22.* Power to take;

3. By the several stamp acts, the indenture must be on a sixpenny stamped piece of paper or parchment; but is exempted from the additional stamps and duties for money given with the apprentice. Indenture to be stamped.

4. And where any poor child shall be appointed to be bound apprentice by the 43 *El.* the person to whom he is appointed to be bound, shall receive and provide for him, Persons refusing to take.
and

and also execute the other part of the indentures ; and if he shall refuse so to do, oath being thereof made by one of the churchwardens or overseers, before two justices, he shall forfeit 10l. by distress and sale, by warrant (B) of such justices, to the use of the poor of the parish or place where the offence was committed ; saving always to the person, to whom any poor child shall be appointed to be bound apprentice, if he shall think himself aggrieved thereby, his appeal to the next sessions, whose order therein shall be final. 8 & 9 W. c. 30. s. 5.

And as the churchwardens and overseers have power to place out poor children, therefore they are proper judges of persons who are fit to be their masters ; and those are, all persons, who by their profession or manner of living, have occasion to keep servants ; but the same are to be approved of by the justices, and if such master is dissatisfied, he may appeal to the sessions. *Dalt. c. 58.*

T. 13 W. Minchamp's case. Two justices bound an apprentice to a merchant : He appealed to the sessions, and the order was discharged. And now the court, on consideration of the matter, confirmed the order of sessions ; because the act having made persons compellable to take apprentices, and given an appeal to the sessions, it was in the discretion of the justices at sessions to determine, whether it was or was not fitting to put an apprentice upon any one ; and therefore the court would not disturb what the sessions had done, but confirmed the order. 2 *Salk.* 491.

E. 13 An. Q. and Wagstaff. It was moved to quash an order to compel a person to take an apprentice, because in the close of the indenture it was said, that the master, at the end of the term, shall give his apprentice two suits of cloaths. Upon debate, the court held this to be ill ; for the justices during the term of his apprenticeship cannot order him wages, they must only order him a maintenance as an apprentice, and cannot order him any thing after the term is ended. So the order was quashed. *Foley* 205. *Sess. C. V.* 1. 48.

V. Money given to bind out poor apprentices.

By the 7 f. c. 3. All money given by any person to be continually employed for the binding out apprentices, shall be employed in manner following, unless otherwise ordered by the givers ; viz. All corporations, or towns corporate, and in places not corporate, the minister, constables, churchwardens, overseers, or the most part of them, shall have the nomination and placing of such apprentices,

prentices, and ordering of such money; and if they shall not employ the same accordingly, every person offending shall forfeit 3l. 6s. 8d. half to the poor, and half to him that shall sue. *f. 2.*

And the master that shall receive the money, shall be bound with one or two sureties in double the sum, unto such corporation, or to the other persons appointed by this act in places not corporate, to take care of it, on condition to repay it at the end of seven years, or within three months thereof; and if the apprentice shall happen to die within the seven years, then within one year after such death, and if the master shall die, then within one year after such master's death. *f. 3.*

And the said money shall always be put forth in three months after it shall come to the said parties hands; and if there are not then fit persons to be bound apprentices, within the places where the money is given to be employed, it shall be disposed of for binding some of the poorest children of any adjoining parish. *f. 4.*

And choice shall always be made of the poorest children; and no such apprentice shall be above 15 years of age when bound. *f. 5.*

And the said persons, in places not corporate, shall yearly within a month after *Easter*, account to their successors before two justices dwelling in or next to the place. *f. 6.*

And if any of the trustees shall break their trust, or commit any offence for which no penalty is given by this act; any person may petition the lord chancellor, who may issue a commission to hear and determine the same, and may levy the money misemployed upon such defaulters, or otherwise upon such able inhabitants of the place, as they shall think fittest; and persons aggrieved may appeal to the lord chancellor. *f. 7.*

VI. Binding poor apprentices to the sea-service.

1. It shall be lawful for two justices, and for the head officers in corporations, and for the churchwardens and overseers of the several parishes or townships, with the consent of such justices or head officers, to bind and put out any boy of the age of ten years or upwards, or who shall be chargeable, or whose parents shall be chargeable, or who shall beg for alms, to be an apprentice to the sea-service, to any subject being master or owner of any ship or vessel, until he shall attain the age of 21 years. 2 & 3 *An. c. 6. f. 1.*

Who may be bound.

And

And every person to whom any poor parish boy shall be put apprentice by the 43 *El.* may, with the consent of two justices dwelling near the parish where such poor boy was bound, or with the like consent of the chief officer in a corporation, at the request of the master, his executors, administrators, or assigns, by indenture assign over such poor boy apprentice, to any master or owner of a ship or vessel, using the sea service, during the remaining time of his apprenticeship. *f.* 6.

Who shall take.

2. And every master or owner of a ship, from 30 to 50. ton burden, shall be obliged to take one such apprentice, and one more for the next 50 ton, and one more for every hundred ton such ship shall exceed the burden of an hundred ton; on pain of forfeiting 10*l.* to the poor of the parish from whence such boy was bound. *f.* 8.

But no master shall be obliged to take any such apprentice, under 13 years of age, or who shall not appear to be fitly qualified both as to health and strength of body for that service. 4 *An. c.* 19. *f.* 16.

Age to be inserted in the indenture.

3. The boy's age shall be inserted in the indenture, being truly taken from a copy of the entry in the register book (where it can be had), which copy shall be given and attested by the minister without fee: And where no such entry can be found, two such justices, and such head officers, shall as fully as they can inform themselves of such boy's age, and from such information shall insert the same in the indentures. 2 & 3 *An. c.* 6. *f.* 1.

What money shall be given with him.

4. And the churchwardens and overseers shall pay down to the master, at the time of the binding, the sum of 50*s.* for cloathing and bedding; and the charges by this act appointed, shall be allowed on their accounts. 2 & 3 *An. c.* 6. *f.* 2.

Indentures to be registered.

5. The churchwardens and overseers shall send the indentures to the collector of the customs at the port whereunto the master belongeth; who shall enter the indenture in a book, and make an indorsement upon the indenture of the registry thereof, subscribed by him, without fee. And if he shall neglect or refuse to enter such indentures, and indorse the same, or make false entries, he shall forfeit 5*l.* to the poor of the parish from whence such boy was bound. 2 & 3 *An. c.* 6. *f.* 5.

Apprentice how conveyed to the port.

6. Such apprentice shall be conveyed to the port to which his master belongeth, by the churchwardens and overseers, or their agents; and the charges thereof shall be paid as by the vagrant act of 11 & 12 *W.* 2 & 3 *An. c.* 6. *f.* 10.

That is to say, out of the gaol and marshal's money; which by the 12 G. 2. c. 29. is directed to be paid out of the general county rate.

7. The counterpart of the indenture shall be sealed and executed by the master, and attested by the collector of the port, and the constable or other officer who carries the apprentice; which officer shall transmit such counterpart to the churchwardens and overseers of the place from whence the apprentice was bound. 2 & 3 An. c. 6. f. 11. Counterpart to be then executed.

8. And the collector or his deputy shall transmit a certificate under his hand, to the commissioners of the admiralty, containing the name and age of such apprentice, and to what ship he belongs; and on receipt of such certificate, a protection shall be made and given *gratis* to such apprentice, till he attain the age of 18 years. 2 & 3 An. c. 6. f. 5. Protection from being impressed.

Also every person who shall voluntarily bind himself apprentice to the sea service, shall not be impressed for three years from the date of his indentures; which indentures shall be registered, and certificates thereof given and transmitted by the collector as aforesaid; on receipt of which certificates, protections shall be made and given for the first three years, without fee. *id.* f. 15.

But by 4 An. c. 19. No person of the age of 18 years shall have any protection from being impressed, who shall have been in any sea service, before he bound himself apprentice. f. 17.

But every person not having before used the sea, who shall bind himself apprentice to serve at sea, shall be exempted from being impressed for three years: and the commissioners of the admiralty, on due proof of the circumstances, shall grant a protection accordingly, without fee. 13 G. 2. c. 17.

9. When such parish or voluntary apprentice shall be impressed, or voluntarily enter into the king's service, the owner or master, his executors, administrators, or assigns, shall be intitled to able seamen's wages, for such of the apprentices, as shall upon due examination be found qualified for the same, notwithstanding their indentures of apprenticeship. 2 & 3 An. c. 6. f. 17. When impressed, the master to have the wages.

10. Such poor boys bound out, or assigned over, to the sea service, until they shall attain to the age of 18 years, shall be exempted from the payment of 6d. a month to Greenwich hospital. 2 & 3 An. c. 6. f. 7. Exempted from the 6d. a month.

Master to enter
his apprentices
on clearing out.

11. Every master so obliged to take such apprentice, shall after his arrival into any port aforesaid, and before he clears out of such port, give an account in writing under his hand, to the collector, containing the names and number of such apprentices as are there remaining in his service. 2 & 3 *An. c. 6. f. 9.*

The same to be
inserted in the
cocquet.

12. And every custom-house officer shall insert at the bottom of their cocquets, the number of men and boys on board the respective ships at their going out, describing the apprentices by their names, ages, and dates of their indentures, for which no fee shall be taken. 2 & 3 *An. c. 6. f. 14.*

Registry to be
kept in the
ports.

13. And the collector in the port shall keep a register, containing the number and burden of all ships belonging to the port, together with the masters or owners names, and also the names of all such apprentices in such ships, and from what parishes and places they were sent; and shall transmit (gratis) true copies thereof signed by him, to the quarter sessions, or to such towns corporate, parishes, or places, when and so often as he shall be reasonably required so to do; and every collector refusing or neglecting to send such copy, shall forfeit 5 l. to the poor of the parish from whence such boy was bound. 2 & 3 *An. c. 6. f. 13.*

Differences be-
tween such mas-
ters and appren-
tices.

14. Two justices near the port, and mayors of towns corporate, in or near adjoining to such port, to which such ship or vessel shall at any time arrive, may determine all complaints of ill usage from the master to such apprentice, and also of all such as shall voluntarily put themselves apprentices to the sea service, and make such order therein as they are now enabled by law to do, in other cases between masters and apprentices. 2 & 3 *An. c. 6. f. 12.*

Penalties.

15. All the penalties aforesaid shall, by warrant of two justices of the county, city, or town corporate, be levied by distress and sale. 2 & 3 *An. c. 6. f. 18.*

Master dying.

16. If the master shall die, during the term, his widow, or his executor or administrator may assign over such apprentice to any other master who hath not his complement of apprentices. 4 *An. c. 19. f. 16.*

Note, By the 2 G. 3. c. 15. Masters, apprentices, mariners, and others employed in fishing vessels upon the coasts, are exempted, during such their employment, from being impressed. *f. 22, 23, 24, 25.*

VII. Differences between the master and apprentice.

1. The master is allowed by law with moderation to chastise his apprentice. *Dalt. c. 58.* Master may chastise his apprentice.

2. An apprentice being by deed, cannot be discharged but by deed: but the master and apprentice may, by agreement between themselves, leave each other; and if so, then the master may give leave under his hand for the apprentice to depart; and then one justice out of sessions may discharge him, allowing the cause of his departure. *Dalt. c. 58. 6 Mod. 182.* Whether the master himself can discharge his apprentice.

But it seemeth that this shall not extend to parish apprentices, for that there the overseers are parties to the contract, which cannot therefore be avoided by any agreement between the master and his apprentice.

But if the master and his apprentice cannot agree, they may proceed in one of these two ways; either upon the statute of the 5 *El. c. 4.* or upon the statute of 20 *G. 2. c. 19.*

3. By the 5 *El. c. 4.* *If any such master shall misuse or evil intreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being grieved, and having cause to complain, shall repair unto one justice (C D) of the county, or to the mayor or other head officer of the city, town corporate, or market town, or other place where the master dwelleth; who shall by his wisdom and discretion take such order and direction between the master and his apprentice as the equity of the cause shall require; and if for want of good conformity in the master, the said justice (or head officer) cannot compound and agree the matter, he shall take bond of the said master to appear at the next sessions; and on his appearance, and hearing of the matter there, if it be thought meet to discharge the said apprentice, then the justices, or four of them at the least (1 Q.) or the said mayor or other head officer, with the consent of three other of his brethren, or men of best reputation in such city, town corporate, or market town, shall have power, in writing (E) under their hands and seals, to pronounce and declare, that they have discharged the said apprentice of his apprenticeship, and the cause thereof: And the said writing, being inrolled by the clerk of the peace, or town clerk, amongst the records, shall be a sufficient discharge for the apprentice against his master, his executors and administrators. And if the default shall be found to be in the apprentice, then the said justice, or the said mayor or other head officer, with the assistance aforesaid, shall cause such due correction* Differences between the master and apprentice by 5 *El. c. 4.*

rection and punishment to be administred unto him, as by their wisdom and discretions shall be thought meet. f. 35.

If any such master] That is, any such master as is before mentioned in this statute, in the trades therein specified; and the former resolutions confined the sense of the statute to such trades only, but the latter adjudications seem to extend the equity thereof to other trades not mentioned in the statute; as in the following instances:

M. 7 IV. K. and Gately. On a certiorari it was moved to quash an order of sessions, for the discharge of one *Edward Green* from his apprenticeship to the defendant *Gately*. The fact was, that *Gately* was a mountebank, and being at a place in *Yorkshire*, where he kept a publick stage, *Green* was by indenture bound apprentice to him in this manner, *viz.* to *Robert Gately*, surgeon, to learn the trade he now useth; and immediately he went upon the stage, and ever since continued in the employ. After which, being with his master *Gately*, in *Middlesex*, he complained to the justices, that his master did not teach him the trade. Upon which they discharged him. This being done, *Green* set up the trade of mountebank himself. It was moved to quash the order, the justices being willing, because they were imposed upon. And the exception was, that the statute of the 5 *El.* in discharging apprentices is confined, and extends only to apprentices mentioned in that clause, and there neither surgeon nor mountebank is mentioned: And tho' a surgeon may be a trade within the statute, which a man cannot exercise without serving an apprenticeship to, because that clause of the statute is general; yet this part of the statute, relating to the discharge of apprentices, extends only to trades there mentioned. By the court; The clause relating to the discharge of apprentices is general, and goes to all manner of apprentices, even to those of merchants; but afterwards the court were of opinion, that the power of discharging reaches only to the trades mentioned in the statute, among which a surgeon is not mentioned; for that, tho' as to the serving seven years apprenticeship, a servant comes under the general term of arts and misteries, yet the power of discharging reaches only to the trades particularly mentioned. 2 *Salk.* 471, 2.

And *M. 12 An. Q. and Furnese.* It was held, that the statute extends only to the trades therein mentioned; and therefore not to a glass bottle maker. *Caf. of S.* 29.

On the other hand, in the case of *K. and Collingbourn*, *M. 12 G.* Exception was taken to an order of discharge, that

that the justices could not discharge the apprentice, because the trade to which he was bound, *viz.* a glazier, was not within the statute: But not allowed; for tho' formerly it was held, that the trade ought to be a trade within the statute, yet the latter resolutions have been otherwise. *L. Raym.* 1410. *Str.* 663.

Shall misuse or evil intreat his apprentice] An apprentice to a surgeon was sent by his master to the *East Indies*: It was adjudged, that the master cannot compel his apprentice to go beyond the sea, except the master go with him; but he may send him to any part of *England*. 13 *Ja. Coventry* and *Windall*. *Brownl.* 67.

But otherwise, if it be expressly agreed, or the nature of the apprenticeship doth import it; as if the master be a merchant adventurer, or sailor. *Hob.* 134.

Evil intreat] *E. 8 G. 2. K. and Eafman*. An apprentice was discharged, the master having *used him unkindly*, and refusing to provide for and entertain him: But by the court, this is not a good ground for the discharge; for there is a power to oblige the master to receive and entertain the apprentice, and *using him unkindly* is too loose. *Str.* 1014.

Or the apprentice do not his duty to his master] *T. 4 G. K.* and inhabitants of *Hales Owen*. An order reciting that *Joseph Higgen* was bound out by indenture, as the statute requires, to *John Parks*, and being lame, and having the king's evil, and in the opinion of surgeons incurable; therefore the justices discharge the master from his apprenticeship. It was moved to confirm the order, because the master cannot now have the end of the binding, which was, the service of his apprentice. But it was answered, that the statute only impowers the justices to discharge for misbehaviour, and not for sickness. And quashed by the court; for the master takes the apprentice for better and worse, and is to provide for him in sickness and in health. *Str.* 99.

Shall repair unto one justice] Upon an order made at the sessions to discharge an apprentice, it did not appear, that he applied himself to a justice first. And *Holt Ch. J.* was of opinion, that the justice hath power to make an order, and if obeyed by the master, then the sessions can have no power; if disobeyed, then the justice upon complaint may bind the master to the sessions, and that the sessions have no power otherwise. 1 *Salk.* 67.

Apprentices.

T. 13 W. K. and Johnson. Exception was taken to an order for discharging an apprentice, that the complaint was made originally at sessions, without any previous application to a single justice out of sessions: *Holt Ch. J.* delivered the opinion of the court, That the order was good; if it had been a new question, he should have held a prior application to some justice out of sessions necessary; but after so many orders affirmed in this court, which have been otherwise, it is too late to unsettle that now. *1 Salk. 68.*

So also, in the case of *K. and Gill, H. 5 G.* It was said by the court,—It hath been so often resolved, that the sessions hath an original jurisdiction, that we will not suffer it now to be made a question, though it might be doubtful upon the statute itself. *Str. 143.*

And, *T. 12 G. K. and Davie.* The court agreed, that it is a point not now to be disputed, that the sessions hath an original jurisdiction to discharge apprentices. *Str. 704.*

Or to the mayor or other head officer] M. 12 G. K. and Collingburne. An order of sessions was made at *Hicks's Hall*, for the discharge of an apprentice to a freeman of the city of *London*, and who was bound and inrolled there. And the order being removed into the king's bench, the question was, whether the court of sessions at *Hicks's Hall* hath any jurisdiction to discharge an apprentice to a freeman of *London* (especially as there is a saving in the act, of the custom of the city of *London*); or whether he ought not to be discharged by the mayor's court only. It appeared, that the apprentice lived with his master out of the city of *London*, and within the jurisdiction of the justices of *Middlesex*. To this exception it was answered, that the statute doth not regard where the binding or inrolling is, but gives the jurisdiction expressly to the justices where the master lives; and if this did not belong to the justices of *Middlesex*, where the master lives, there would be a failure of justice: for neither the chamberlain, nor any other city magistrate, have power to compel the master's appearance before them. The court affirmed the order of discharge, and said they would not take away the jurisdiction of the mayor's court, but only give a concurrent jurisdiction to the justices for the county. And it would be very inconvenient, to have apprentices to a freeman of *London*, who are bound there, and who live in distant countries, obliged to come up to the mayor's court to get themselves discharged: And the words of the statute are very plain; for they give the jurisdiction

jurisdiction to the justices *where the master dwelleth*. Str. 663.

On his appearance] *E. 13 W. Ditton's case*. It was moved to quash an order made for the discharge of an apprentice. The question arose upon the clause of the statute, which directs, that upon appearance of the master, the apprentice may be discharged by four justices, after one justice out of sessions hath endeavoured to compose the matter in difference. And in this case it was objected, that *Ditton* the master was bound over to appear, and did not; and the justices have but a limited jurisdiction, and it is expressly directed by the act, that the discharge is to be made on the appearance of the master; besides, there is another remedy, to proceed on the recognizance which is forfeited by not appearing. By the court; The act must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy; and it would be very hard, that supposing the master is profligate, and runs away, the apprentice shall never be discharged. 2 Salk. 490.

H. 5 G. K. and Gill. An order of sessions for discharging an apprentice was quashed, because it did not set forth, that the master was summoned, or did appear. Str. 143.

So also, *E. 8 G. 2. K. and Eastman*. The order was quashed, because it did not appear that the master was present or summoned, which it is plain the act intended he should be. Str. 1013.

Enrolled by the clerk of the peace] *T. 4 G. K. and inhabitants of Hales Owen*. The order of discharge was not enrolled; and by the court for that reason held ill. Str. 99.

Shall be a sufficient discharge for the apprentice against his master] But as the justices may discharge the apprentice from his master, for ill usage; so also they may discharge the master from the apprentice for evil and disorderly behaviour. Read. Appr.

Discharge] *T. 13 W. K. and Johnson*. Exception was taken to an order of discharge, that the justices had ordered money to be returned: But by the court, the order is good. And Holt Ch. J. said, he never doubted of that matter, for it is a power consequential upon their jurisdiction to discharge. 1 Salk. 68.

But in the case of *K. and Vandeleer*, *M. 4 G.* The justices at the sessions did order an apprentice to be discharged, and that the master having received 5*l.* with

him, should refund 3l. as a further provision for him. This was moved to be quashed, because the statute which gives the justices power to discharge, gives them no authority to order any money to be returned. By the court; It is very hard, that if the master misuseth his apprentice, the next day after he is bound, he should pay back nothing if he is discharged: It will be an encouragement to masters to treat their apprentices ill; but the statute being silent, the order must be quashed. *Str.* 69.

Nevertheless, this doctrine of refunding seemeth now to be established, as founded on great reason, tho' not expressly mentioned in the act; for the justices being authorized to discharge *according to their discretions*, when the end of the apprenticeship cannot be attained with one person, it is but justice the master should return part of the money he has received with his apprentice, to place him out with a new master. *2 Bac. Abr.* Master and servant. C.

And in the case of *K. and Amies, T. 7 G. 2.* it was held, that an order on the master to return money is good, tho' it is not averred that he had any with the apprentice; for the order being to return money is a necessary proof of the receipt of it; and the justices in their orders are not obliged to set forth all the steps they take in their proceedings, there being nothing in the act which makes it necessary; and there is a known and established distinction between orders and convictions. *id.*

In the chancery, Jan. 22. 1745. *Ex parte Sandby.* The petitioner, on the tenth of January 1744, was put apprentice to *Ward*, a bookseller at *York*, and the sum of 80l. was given with him as an apprentice for 7 years. In July following, a commission of bankruptcy was taken out against *Ward*; and being declared a bankrupt, assignees were chosen, who sell off the bankrupt's effects, and he is now the supervisor of the press to the purchaser, and become incapable of performing his part of the contract, nor is the petitioner able to raise any money to put him out apprentice to another master, and the commission being a recent one, probably no dividend may be made in a year, or a year and half; so that all this time will be lost to the petitioner. Upon these circumstances, the petitioner prayed, that on deducting 10l. out of the 80l. for his board with the bankrupt during the six months he lived with him, the assignees might be ordered to pay him the sum of 70l. out of the effects of the bankrupt already come to their hands, and not oblige him to prove it as a debt under the commission. The lord chancellor

Härdwicke was at first doubtful, and seemed inclined to grant the petition, but on ordering search to be made for precedents, and several being produced wherein it was directed that apprentices should come in as creditors only, after deducting for the time they lived with the bankrupt, upon the remaining sum; it was ordered accordingly in this case, and that the petitioner should be admitted a creditor for 70l. only. *Tracy Atkins* 149.

Shall cause due correction and punishment to be administered] This being left indefinite, it seemeth most apposite, that the justice commit the apprentice to the house of correction for a time, to be kept to hard labour, or otherwise corrected as the nature of the offence may require.

4. By the 20 G. 2. c. 19. On complaint (F) unto two justices, by any parish apprentice, or other apprentice upon whose binding out no larger a sum than 5l. was paid, concerning any misusage, refusal of necessary provision, cruelty, or other ill treatment, they may summon (G) the master or mistress, to appear before them at a reasonable time to be named in such summons; and on proof upon oath of the truth of the said complaint (whether the master or mistress be present or not, if service of the summons be also upon oath proved) the said justices may discharge (H) the apprentice by warrant or certificate under their hands and seals, for which warrant or certificate no fee shall be paid. §. 3.

Differences between the master and apprentice by 20 G. 2. c. 19.

And such justices on complaint (IK) on oath by any master or mistress, against any such apprentice, concerning any misdemeanor, miscarriage, or ill behaviour, may hear and determine the same, and punish the offender, by commitment (L) to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month, or otherwise by discharging (M) such apprentice. §. 4.

Persons aggrieved by any determination, order or warrant of such justices (except any order of commitment) may appeal to the next sessions; who may award costs to either party not exceeding 40s. to be levied by distress and sale. §. 5.

And no certiorari shall issue to remove any the said proceedings. §. 6.

5. If any apprentice of husbandry, or of any art or occupation aforesaid, shall flee into any other shire, the justices, mayors, or other head officers being justices, may issue writs of capias to the sheriffs of the counties or other head officers of the places whither he shall so flee, to take his body, returnable before them at what time shall please them; so that if he come by such process, he may be put

Apprentice fleeing into another shire.

Apprentices.

in prison, till he find sufficient surety well and honestly to serve his master. 5 *El. c. 4. f. 47.*

And by the 24 *G. 2. c. 55.* If a justice shall issue a warrant against such person, and he shall escape into another shire; the constable or other person, on having the warrant indorsed by a justice in such other shire, may arrest him there, and carry him before a justice in such other shire, if the offence is bailable, to find bail, or else shall carry him back before a justice in the shire from whence the warrant did first issue.

VIII. Apprentice stealing his master's goods.

By the 21 *H. 8. c. 7.* Servants going away with their master's goods, with intent to steal them, shall be guilty of felony; but not to extend to apprentices.

And by 12 *An. st. 1. c. 7.* Persons stealing to the value of 40s. being in a dwelling house or outhouse thereto belonging, tho' such house be not broken, and tho' no person be therein, are excluded from the benefit of clergy. But this not to extend to apprentices under fifteen years of age.

But if they be fifteen years of age, they shall be guilty as other persons.

IX. Inticing away an apprentice.

The inticing of an apprentice to depart from his master, is not an offence of a publick nature, for which an indictment will lie; but the party's remedy is by an action on the case, which he may well maintain. 6 *Mod. 182. Q. and Daniel.*

X. Assigning apprentices. (N.)

The master assigning, and the apprentice himself consenting, will not make him an apprentice to the assignee within the fifth of *El.* But by the custom of *London*, he may be turned over to another. *Dalt. c. 58.*

And an assignment to the sea service is good by act of parliament, as is before mentioned.

E. 3 G. K. and Barnes. Order returned on a certiorari: It is resolved by the justices at the sessions, where a person was bound an apprentice to *Barnes* by the parish officers, and *Barnes* had assigned him to another, that the assignment is void, and they direct *Barnes* to take his apprentice again. But by the Court; The sessions had no power

power to judge of the validity of a deed, or to hinder a man from assigning his apprentice. The covenant to provide for him is well performed, if the person to whom he is bound assigns him to another to provide for him. Wherefore the order was quashed. *Foley* 155. *Str.* 48.

For the jurisdiction of the justices extends no farther, than to compel the master to take care of his apprentice; but in what manner he does it, whether in his own house or otherwise, is nothing to them. But if the assignee of the apprentice doth not provide for him, the first master may be compelled to do it, and he may take his remedy over. *Sess. C. V. 1. 110.*

XI. Master dying.

It hath been said, that if the master dies, the apprentice goes to the executor or administrator to be maintained, if there are assets; but the executor or administrator may bind him to another master for the remaining part of his time.

And in *M. 10 IV. K. and Peck.* *Eyre J.* held, that an apprenticeship is a personal trust between the master and servant, and determines by the death of either of them; and by the death of either of them, the end and design of the apprenticeship cannot be obtained, and it may be the executor is of another trade; he admitted covenant would lie against the executor, but in that there is no inconvenience, because the executor may make his defence by pleading no assets, or debts of a higher nature. *Holt C. J.* said, that by the custom of *London*, the executor shall put the apprentice to another master of the same trade; and that in other places, it would be very hard to construe the death of the master to be a discharge of the covenants; he said, it had been held, that the covenant for instruction failed, but that he still continues an apprentice with the executor, as to maintenance. *1 Salk. 66.*

E. 20 G. 2. Baxter (widow and executrix) against *Burfield.* In debt on bond, conditioned for *Matthias Anderson's* performance of the covenants in an indenture of apprenticeship, whereby he was bound to the plaintiff's testator, who was a mariner: the defendant pleaded, that *Anderson* served faithfully to the death of the testator: the plaintiff replied, that since the death of the testator, *Anderson* had absented from her service: to which there was a demurrer. And after argument at bar, *Lee Ch. J.* delivered the resolution of the court, *viz.* That they were all of opinion the defendant should have judgment, and that
the

the executrix could maintain no such action. The binding was to the *man* to learn *his* art, and serve *him*, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the apprentice is bound from a personal knowledge of the integrity and ability of the master. *H. 8 An. Horne and Bluke*; an award that an apprentice should be assigned, was held void; unless there was a custom, or the concurrence of the apprentice. And they held, it was not material, that according to *Cro. Eliz.* 553. the assets were liable on the master's covenant to maintain. Therefore judgment was given for the defendant. *Str.* 1266.

Note, the words in *Cro. Eliz.* 553. are these: A covenant lies against an executor in every case, altho' he be not named; unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform.

But in the case of *K. and East-Bridgeford, T. 12 G. 2.* Upon a special order it was stated, that an apprentice upon the death of his master, was with his own consent turned over by the widow (who had taken no administration) to another master whom he served. And the court held it a good settlement in the last parish, within the reason of those cases, where an apprentice was bound to a person in one parish, but with the master's consent served with another person in another parish, and there gained a settlement. *Str.* 1155. But upon the face of this case it appears, that the assignment by the widow was with the apprentice's consent; and so it became in effect a new apprenticeship: but if it had been without the apprentice's consent, then it seemeth that this case would have fallen within the reason of the case abovementioned of *Baxter and Burfield*, and consequently that such assignment would have been of no effect.

E. 27 G. 2. K. and parish of Silkston. It was moved to quash an order of sessions, upon this case: *George Whitworth* was put out as a parish apprentice at *Ekren*; served several years; ran away three quarters before he became 21 years of age: his master dies; and after, he hires himself for a year at *Silkston*; and after that, for another year with another person; and serves those years; and received the wages to his own use. The executors knew of these services, and suffered him to remain in them without molestation. The question was, Whether the apprenticeship was determined by the death of the master, and the apprentice thereby became *sui juris*? The order of the two justices was, that he had a settlement at *Silkston*,
where

where he was hired ; the order of sessions, that it was at *Ekren*, where his apprenticeship was. The court held, that he gained a settlement at *Silkston* by his service there ; and quashed the order of sessions.

In the court of chancery : *M. 30 C. 2.* In the case of *Soam* against *Bowden* and *Eyles*. The master received with the apprentice 250*l.* and died within two years, the apprentice having for that time been employed only in inferior affairs. It was decreed, after debts on specialties paid, that the executors repay the 250*l.* as a debt due on simple contract ; deducting after the rate of 20*l.* a year, for the maintenance of the apprentice, during the time he lived with his master. *Cha Ca. Finch.* 396.

XII. Apprentices setting up their Trades.

By the common law, no man may be prohibited to work in any lawful trade or in more trades than one, at his pleasure. *11 Co.* 53.

So that without an an act of parliament no man may be restrained, either to work in any lawful trade, or to use divers misteries or trades ; therefore an act of parliament made to restrain any person herein, must be taken strictly, and not favourably as acts made in affirmance of the common law.

The restraining clause in the statute of 5 *El. c. 4.* is as follows : *It shall not be lawful to any person, to set up, occupy, use, or exercise, any craft, mystery, or occupation now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at the least as an apprentice by this statute, nor to set any person on work therein, except he shall have been apprentice as aforesaid, or else having served as an apprentice will become a journeyman, or hired by the year ; on pain of 40*s.* a month, half to the king, and half to him that shall sue in the sessions, or other court of record ; or if it is in a town corporate, then to be disposed of as other fines by the charter.* *l. 31.*

It shall not be lawful] This is a negative clause, and no one shall exercise a trade against it, unless by virtue of a custom as the widows of tradesmen, who by custom carry on the trade of their husbands, which the court held not to be within this statute. *2 Salk.* 610.

To any person] But by the 15 *C. 2. c. 15.* Hemp workers of all kinds, net makers, and makers of tapestry hangings are excepted ; who may set up without having served seven years.

And

And by 3 G. 3. c. 8. All officers, mariners, and soldiers, who have been employed in his majesty's service, and not deserted, may exercise such trades as they are apt for, in any town or place.

And by 6 & 7 W. c. 17. An apprentice discovering two offenders guilty of coining, so as they be convicted, shall be deemed a freeman, and may exercise his trade as if he had served out his time. *f.* 12.

To set up, occupy, use, or exercise] T. 3 W. Hobbs and Young. Exercising a trade by others who have served seven years is within the statute; for he that hath not served an apprenticeship is thereby restrained to work as a trader, either by himself or others; for the intent of the act is, to annex the benefit of trade to such as underwent the hardship of learning it, thereby to encourage labour in youth: And few would undergo the trouble of being apprentices, if they might employ others to work for them. 2 Salk. 610.

If a man use the trade of a tallow chandler, baker, brewer, or any other lawful trade, or manual occupation, for his own use, or for the use of his family, without selling any for lucre and gain, he may lawfully do it; but he cannot retain any apprentice therein; but he may hire one to be his servant, who is skilful in that trade or occupation. 8 Co. 129.

Now used] That is, on the 12th of Jan. 1562. when that parliament began; and this restraint shall not extend any further, than the words do expressly direct, and therefore not to new arts and mysteries since invented. 1 Roll. Rep. 10. 1 Ventr. 326, 346.

Within the realm of England and Wales] M. 1 G. 2. K. and Lister. Indictment for using the trade of a dry salter, being a craft, mystery, or occupation used in *this kingdom* on the 12th day of Jan. in the 5th year of Eliz. Which the court held to be ill; for that the words in *this kingdom* tie down the indictment to the kingdom of Great Britain, as it is at this day; whereas it should have been *in England, or in England and Wales.* Sess. C. V. 2. 160. Str. 788.

H. 3 G. 2. K. and Monro. It was moved to quash an indictment for exercising the trade of a baker, the defendant not having served a legal apprenticeship. The exception was, that the trade was not laid to be used *within the realm of England and Wales* at the time of the act. But the court said, the trade of a baker is within the words of

the act; and no averment of the trade's being used at the time of the act is necessary, but where the trade only falls within the general conclusion of the clause at last. 1 *Barnardist.* 277.

Except he shall have been brought up therein seven years] E. 11 *W. K. and Fox.* Indictment for using the trade of a taylor, not having served seven years, was quashed, because it is said only, not having served as an apprentice within *England* or *Wales*; for it may be he did so beyond sea, and if it were any where it sufficeth. 1 *Salk.* 67.

As an apprentice] E. 5 *An. Q. and Maddox.* By the court; Upon indictment on this statute, in evidence we allow following the trade for seven years to be sufficient, without any binding, this being an hard law. 2 *Salk.* 613.

But in the case of *K. and Morrice, T. 3 G. 2.* On an indictment for exercising a trade, without having served a legal apprenticeship; the defendant offered to give evidence of his having exercised this trade for seven years, as being tantamount to his having served an apprenticeship for that time. Eyre chief justice said, that the cases indeed had gone so far, as to allow a wife's living in the shop with her husband for seven years to be equivalent to an apprenticeship; but he thought the present case not strong enough to come up to the meaning of the statute. Accordingly the evidence was disallowed. 1 *Barnard.* 367.

Or else having served as an apprentice, will become a journeyman] M. 26 *C. 2. K. and Moor.* The defendant was indicted for using the trade of a weaver, not having served as an apprentice seven years, the evidence was, he served six as an apprentice, and had since as journeyman in the same trade worked above that time: And by the court, the serving of seven years is sufficient either way; and the defendant was found not guilty. 3 *Keb.* 400.

A. Indenture of a parish apprentice; on 43 *El.*
c. 2. f. 1, 5.

THIS indenture made the——day of——in the year of our lord——Between A. B. and C. D. churchwardens, and E. F. and G. H. overseers of the poor of the parish of——in the county of——of the one part, and A. M. of——in the said parish, shoemaker, of the other

other part, witnesseth, that the said churchwardens and overseers of the poor, by and with the consent of——two of his majesty's justices of the peace for the said county, dwelling near to [or, in] the said parish of——one whereof is of the quorum, have put, placed and bound, and by these presents do put, place, and bind A. P. a poor boy, whose Parents B. P. and C. P. are not able to maintain him, of the age of——years, to be an apprentice with him the said A. M. and as an apprentice with him the said A. M. to dwell, from the date of these presents, until the said A. P. shall come to the age of twenty-four years [or, if a female, until the said A. P. shall come to the age of twenty-one years, or the time of her marriage, which shall first happen, or for other shorter term, as the agreement shall be] according to the statutes in such case made and provided. By and during all which time and term, the said A. P. shall the said A. M. his said master well and faithfully serve, in all such lawful business as the said A. P. shall be put unto by the command of his said master, according to the power, wit and ability of him the said A. P. and honestly and obediently in all things shall behave himself towards his said master, and honestly and orderly towards the rest of the family of the said A. M. And the said A. M. for his part, for himself, his executors and administrators, doth hereby promise and covenant, to and with the said churchwardens and overseers of the poor, and every of them, their and every of their executors and administrators, and their and every of their successors for the time being, and to and with the said A. P. that he the said A. M. shall the said A. P. in the craft, mystery, and occupation of a shoe-maker, which he the said A. M. now useth, after the best manner that he can or may, teach, instruct, and inform, or cause to be taught, instructed, and informed, as much as thereunto belongeth, or in any wise appertaineth; And that the said A. M. shall also find and allow unto the said apprentice sufficient meat, drink, apparel, washing, lodging, and all other things needful or meet for an apprentice, during the term aforesaid. In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written.

Where the overseers and the master can agree, other covenants may be inserted, according to such agreement; but if the master is to be compelled, it seemeth not safe to require more from him by the indenture than is above expressed.

The assent of two justices.

WE———two of his majesty's justices of the peace for the abovementioned county of ——dwelling near to the abovementioned parish of——and one of us of the quorum, do hereby declare our assent to the binding the abovenamed A. P. an apprentice to the abovenamed A. M. according to the form and effect of the abovementioned indenture. Given under our hands the ——day of, &c.

B. Warrant to levy 10 l. for not receiving a poor apprentice; on the statute of 8 & 9 W.

Westmorland. } To the constables of——

WHEREAS A. B. and C. D. churchwardens, and E. F. and G. H. overseers of the poor of the parish of——in the said county, by the assent of [us]——two of his majesty's justices of the peace for the said county dwelling near to [or, in] the said parish of——one whereof is of the quorum, did endeavour to bind A. P. a poor male child of the said parish, whose parents are not able to maintain him, apprentice to A. M. of——in the said parish, taylor, and for that intent did prepare and duly perfect one pair of indentures pursuant to the statute in such case made and provided, which said pair of indentures was signed and confirmed by [us] the said two justices: And whereas the said A. M. is duly convicted before us the justices aforesaid, as well upon the oath of the said A. B. as otherwise, for that he the said A. M. hath refused, and doth refuse to receive and provide for the said A. P. as an apprentice, and also to execute another part of the said indentures, being duly tendred to him by the said churchwardens and overseers of the poor, whereby the said A. M. hath forfeited the sum of ten pounds: These are therefore, in his said Majesty's name, to require and command you, to make distress of the goods and chattels of him the said A. M. and if within the space of [six] days next after such distress by you made, the said sum of 10 l. together with reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, pay the said sum of 10 l. to the overseers of the poor of the said parish of——where the said offence was committed, for the use of the poor of the said parish; returning the overplus upon demand unto him the said A. M. the reasonable

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charges of taking, keeping, and selling the said distrefs being thereout first deducted. Herein fail you not. Given under our hands and seals the—— day of—— in the year ——

Note, as an appeal is given to the sessions, against the appointment of an apprentice to be bound to any person as aforefaid; it is proper, either not to make out, or not to execute, the warrant of distrefs, until after the next sessions.

And it is to be observed, that one precedent alone in this case is here inserted, for brevity sake, as being not in a matter of constant practice; but it is to be understood, in all such like cases, that there must first be a complaint or information in writing, then a summons of the party accused, or warrant as the case may be, and a hearing and determining of the cause, and conviction thereupon if the party shall be found to be guilty. But as the special fact must be the same throughout all the forms of proceedings, it is easy from one to frame all the rest.

Note, a *summons*, rather than a *warrant*, in all such like cases, between party and party, is generally most eligible; yet in this case it seemeth, that a warrant is justifiable to apprehend the master, and bring him before the justice, (especially if he shall condemn the summons;) because it is required, that he shall give security to the justice to appear at the sessions, if he shall not conform to the justice's order in the premisses.

C. Summons of the master for misusing his apprentice; on 5 *El. c. 4.*

Westmorland. { To the constable of——

WHEREAS complaint and information hath been made unto me——one of his majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of——in the said county, shoemaker, that the said A. M. hath misused and evil intreated him the said A. P. [by cruel punishment, and beating him the said A. P. without just cause, and by not allowing unto him sufficient meat, drink, apparel, or as the case shall be] These are therefore in his majesty's name to command you to summon the said A. M. to appear before me at the house of——in the said county, on——the——day of——at the hour of——in the afternoon of

of the same day, to answer unto the said complaint; and to be further dealt with according to law. Herein fail you not. Given under my hand and seal the ——day of, &c. . . .

D. Summons of the apprentice, on complaint of the master; on the 5 *El. c. 4.*

Westmorland. { To the constable of——

WHEREAS complaint and information hath been made unto me——one of his majesty's justices of the peace in and for the said county, by A. M. of——in the said county, husbandman, that A. P. now being an apprentice to him the said A. M. is negligent, stubborn, disorderly, [or as the case shall be] and doth not his duty to him the said A. M. his master; These are therefore to command you to summon the said A. P. to appear before me, at——in the said county, on——the——day of——at the hour of——in the afternoon of the same day, to answer to the said complaint, and to be further dealt with according to law. Herein fail not. Given under my hand and seal the——day of, &c.

E. Order of discharge by four justices at the sessions; on the 5 *El. c. 4. f. 35.*

Westmorland. **A**T a general quarter sessions of the peace, holden at——in and for the county aforesaid, the——day of——in the——year of the reign of our lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth; Before——justices of our said lord the king assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and of the quorum, It is ordered as followeth;

Upon the petition of A. P. apprentice to A. M. of——in the said county, husbandman, to be relieved upon certain neglects of the said master in instructing him in his trade, and in misusing and evil intreating the said apprentice by cruel punishment [or as the case shall be]; And the said master having likewise appeared upon his recognizance taken before J. P. esquire, one of the said justices, to answer to the complaint of the said petition, and having proved nothing whereby to clear himself of the said complaint; but on the contrary, the said A. P. having given full proof of the truth of the said complaint to the satisfaction of the said court: We therefore,

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whose hands and seals are hereunto set, being four of the said justices, and of the quorum, do hereby order, pronounce, and declare, that the said apprentice shall be, and is hereby discharged and freed from his said apprenticeship: And this to be a final order betwixt the said master and apprentice, any thing contained in their indentures of apprenticeship, or otherwise, to the contrary notwithstanding. Given under our hands and seals the day and year first above written.

F. Complaint of an apprentice to two justices against his master; on 20 G. 2. c. 19.

Westmorland. **T**HE information and complaint of A. P. apprentice to A. M. of——in the said county, husbandman, exhibited before us two of his majesty's justices of the peace in and for the said county, the——day of ——in the year, &c.

Who saith, that he the said A. P. is an apprentice bound by indenture to A. M. of——aforesaid, husbandman; and that he the said A. M. hath misused and ill treated him the said apprentice, and particularly [as the case shall be].

A. P.

Before us,

J. P.

K. P.

G. Summons of the master by two justices, on complaint of the apprentice; on the 20 G. 2. c. 19. s. 3.

Westmorland. } To the constable of——

WHEREAS information and complaint hath been made unto us——two of his majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of——in the said county, husbandman, that he the said A. M. hath misused and ill treated him the said A. P. and particularly [as the case shall be:] These are therefore to require you to summon the said A. M. to appear before us at ——in the said county, on——the——day of——to answer unto the said information and complaint. And be you then there to certify what you shall have done in the execution hereof. Herein fail you not. Given under our hands and seals the——day of——in the year——.

H. Discharge

H Discharge of an apprentice by two justices, on the master misusing him; by the 20 G. 2. c. 19. s. 3.

Westmorland. **W**HEREAS complaint hath been made before us ———two of his majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of———in the said county, taylor, that he the said A. M. hath misused and ill treated him the said apprentice [and particularly, as the case shall be]; And whereas the said A. M. hath appeared before us in pursuance of our summons to that purpose, but hath not cleared himself of and from the said accusation and complaint, but on the contrary the said A. P. hath made full proof of the truth thereof before us upon oath; We therefore by these presents do discharge him the said A. P. of and from his apprenticeship to the said A. M. any thing in the indenture of apprenticeship made betwixt them, or otherwise howsoever, to the contrary notwithstanding. Given under our hands and seals the———day of, &c.

[Or, And whereas it hath been duly proved before us, as well upon the oath of A. C. constable of———aforesaid, as otherwise, that he the said A. C. did duly summon the said A. M. to appear before us at a reasonable time in the said summons mentioned and specified; but notwithstanding the same, he the said A. M. hath not appeared before us according to such summons: We therefore having duly examined into the matter of the said complaint, and the truth thereof having been fully proved before us upon oath, do discharge, &c.]

I. Complaint to two justices of the master against his apprentice; on the 20 G. 2. c. 19. s. 4.

Westmorland. **T**HE complaint and information of A. M. of———in the said county, husbandman, taken and made on oath before us———two of his majesty's justices of the peace in and for the said county, the———day of———Who saith, that A. P. apprentice by indenture to him the said A. M. hath in the service of his apprenticeship been guilty of several misdemeanors, miscarriages, and ill behaviour, towards him the said A. M. and particularly [as the case shall be.]

A. M.

Before us,

J. P.
K. P.

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K. Warrant for a disorderly apprentice, by two justices; on the aforesaid complaint, by the 20 G. 2. c. 19. s. 4.

Westmorland. { To the constable of———

WHEREAS oath hath been made before us——— two of his majesty's justices of the peace in and for the said county, by A. M. of——— in the said county, husbandman, that A. P. apprentice to the said A. M. hath committed divers misdemeanors against the said A. M. his master, and particularly [as the case shall be]: These are therefore to require you forthwith to apprehend the said A. P. and bring him before us, to answer unto the said complaint, and to be dealt with according to law: And you are to give notice to the said A. M. that he appear before us at the same time, to make good the said complaint. Given under our hands and seals, &c.

L. Commitment of an apprentice to the house of correction, on complaint of his master, by two justices; on the 20 G. 2. c. 19. s. 4.

Westmorland. { To the constable of——— in the said county, and to the keeper of the house of correction at——— in the said county.

WHEREAS complaint hath been made before us——— two of his majesty's justices of the peace in and for the said county, upon the oath of A. M. of——— in the said county, husbandman, that A. P. apprentice of the said A. M. hath committed divers misdemeanors against him the said A. M. his master, and particularly [as the case shall be]; And whereas upon examination thereof, and upon hearing the allegations of both parties, having come before us for that purpose, and upon due consideration had thereof, he the said A. P. is and stands convicted before us of the said offence: We do therefore hereby command you the said constable, to take and convey the said A. P. to the said house of correction, and to deliver him to the said keeper thereof, together with this warrant: And we do hereby command you the said keeper of the said house of correction, to receive the said A. P. into your custody in the said house of correction, there to remain and be corrected, and held to hard labour for the space of———. Given under our hands and seals the——— day, &c.

M. Discharge

M. Discharge of an apprentice by two justices, on complaint of the master; by 20 G. 2. c. 19. s. 4.

Westmorland. **W**HEREAS complaint, &c. (as in the last precedent)—We do therefore by these presents discharge the said A. P. from his apprenticeship to the said A. M. any thing in any indenture or indentures of apprenticeship betwixt them, or otherwise, to the contrary notwithstanding. Given, &c.

N. Assignment of an apprentice.

TO all to whom these presents shall come: I A. M. of ——— send greeting. Whereas my apprentice A. P. hath divers years yet to come and unexpired of his apprenticeship, to wit, ——— whole years from the ——— day of ——— now last past, as by his indenture of apprenticeship to me sealed doth appear; Now know ye, that I the said A. M. for divers good causes and considerations me hereunto moving, have given, granted, assigned, and set over, and by these presents do fully and absolutely give, grant, assign, and set over, unto A. S. of ——— all such right, title, duty, term of years to come, service, and demand whatsoever, which I the said A. M. have in or to the said A. P. or which I may or ought to have in him by force and virtue of the said indenture of apprenticeship. And moreover, I the said A. M. do by these presents covenant, promise, and agree to and with the said A. S. his executors and administrators, that notwithstanding any thing by me the said A. M. to be done to the contrary, the said A. P. shall, during the said term of ——— years, well and truly serve the said A. S. as his master, and his commandments lawful and honest shall do, and from his service shall not absent himself during the said term. Provided, that the said A. S. shall well intreat and use him the said A. P. and him the said A. P. in the craft, mystery, and occupation of a ——— which he the said A. S. now useth, after the best manner that he can or may, shall teach, instruct, and inform, or cause to be taught, instructed, and informed, as much as thereunto belongeth, or in any wise appertaineth, and shall also during the said term find and allow unto the said A. P. sufficient meat, drink, apparel, washing, lodging, and all other things needful or meet for an apprentice. In witness, &c.

Approver.

AN *approver* (probator) is a person indicted of treason or felony, and in prison for the same, who upon his arraignment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation, against those that are partners in the crime contained in the indictment. 3 *Inst.* 129.

This accusation of himself, and oath, makes his accusation of another person of the same crime, to amount to an indictment; and if his partners are convicted, he shall have his pardon of course. 3 *Inst.* 129, 130.

But justices of the peace cannot take cognizance hereof, because they have no authority by their commission to assign a coroner. 3 *Inst.* 130.

And besides, as it is in the discretion of the court, whether they will suffer one to be an approver, this method of late hath been seldom practised: And in many cases we have what seems to amount to the same, by statute; where pardon is assured to offenders, on discovering and convicting their accomplices.

Aqua Vitæ. See *Excise*.

Arbitration. See *Award*.

Armour embezilling. See *Stores*.

Armour popish. See *Popery*.

Armour seizing. See *Affray*.

Army. See *Soldiers and Militia*.

Arrack. See *Excise*.

Arraignment.

WHEN an offender comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the gaoler of another prison; the first thing that follows thereupon, is his arraignment. 2 *H. H.* 216.

Now arraignment is nothing else but the calling the offender to the bar of the court, to answer the matter charged upon him. 2 H. H. 216.

And the word in latin (lord Hale saith) is no other than *ad rationem ponere*, and in french *ad resson*, or abbreviated *a resn*; for as the ancient word *disfrain* or *derayn* imports in latin *disfrationare*, to disprove or evince the contrary of any thing that is or may be affirmed, so *arraigne* is *ad rationem ponere*, to call to account or answer. 2 H. H. 216. And this perhaps may be sufficient to shew the meaning of the word, altho' not to declare its derivation; for it seemeth to have flowed unto the french tongue, from its common origin with the greek; of which we shall have little doubt, when we consider the verbs *αγορευειν*, *κατηγορευειν*, and also *διαγορευειν*, as they are used in the classical remains of that language, and compare them with the terms *arraigne*, *adraigne*, *disfrayn*, *derayne*.

The prisoner on his arraignment, tho' under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles or bonds, unless there be a danger of escape, and then he may be brought with irons. 2 H. H. 219.

Also there is no necessity that a prisoner, at the time of his arraignment, hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the court; and if he answers that he is the same person, it is all one. 2 Haw. 308.

Arrest.

THIS is to be understood of arrests in criminal cases only, and not in civil cases.

The word *arrest* is the same, with very little variation, *Arrest, what.* in the English, French, German, Belgic, and other languages of the western empire, heretofore subject to the Roman power; and probably may have been derived unto us thro' the channels both of France and Saxony: the French *arrester* signifieth to stop or stay; and the Saxon *restan*, to rest; and both perhaps have sprung from the Italian *arresto*, and that from the well known Latin verb *sto*, to stand.

And, in law, an arrest doth signify the restraint of a man's person, depriving him of his own will and liberty,
and

and binding him to become obedient to the will of the law :
And it may be called the beginning of imprisonment.
Lamb. 93.

Concerning which I will shew,

I. Who may or may not be arrested

II. For what causes of suspicion an arrest may be.

III. By whom the arrest shall be made.

IV. The manner of an arrest.

V. What is to be done after the arrest.

I. Who may or may not be arrested.

Privilege of parliament.

1. Generally, a member of parliament shall have the privilege of parliament for himself and his servants to be freed from arrests : but for treason, felony, and breach of the peace there can be no privilege. 4 *Inst.* 24, 25.

Peers and bodies corporate.

2. In cases of peers and corporations, the process is a distringas, for they cannot be arrested. 3 *Salk.* 46.

Persons charged in execution.

3. In the case of *K. and Woodham*, *H. 2 G. 2.* upon a motion for an information against the defendant, who was a justice of the peace ; it was held, that a person in execution in the king's bench may be there charged criminally by a justice of the peace's warrant : but that no such justice can take a prisoner of this court out of the custody of the court, and send him to the county gaol. *Str.* 828.

In churchyards.

4. None shall arrest priests or their clerks, or other persons of holy church, whilst they attend to divine service, in churches, churchyards, or other places dedicated to god ; on pain of imprisonment and ransom at the king's will, and he shall also make gree to the parties arrested. 50 *Ed. 3. c. 5.* 1 *R. 2. c. 15.*

On Sundays.

5. Also a warrant executed against any person whatsoever, on the lord's day, is void ; and the persons serving the same shall suffer damages, as if they had done the same without warrant ; except in cases of treason, felony, and breach of the peace. 29 *C. 2. c. 7. f. 6.*

II. For what causes of suspicion an arrest may be.

Suspicion.

By the statute of 34 *Ed. 3. c. 1.* Power is given to the justices of the peace, to arrest all those whom they find by indictment, or by *suspicion*, and to put them in prison.

And

And the causes of suspicion, which are generally agreed Causes of suspicion. to justify the arrest of an innocent person for felony, are these that follow:

(1) The common fame of the country; but it seems, Common fame. that it ought to appear upon Evidence, in an action brought for such arrest, that such fame had some probable ground.

2 *Haw.* 76.

(2) The being found in such circumstances, as induce Circumstances of guilt. a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 *Haw.* 76.

(3) The behaving one's self in such a manner as Flight. betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him doth abscond. 2 *Haw.* 76.

But the party who flies from an arrest for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him. 2 *Haw.* 122.

(4) The being found in company with one known to Evil company. be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 *Haw.* 76. 2 *Inst.* 52.

(5) The living an idle, vagrant, and disorderly life, Living idle. without having any visible means to support it. 2 *Haw.* 76.

(6) The being pursued by hue and cry. 2 *Haw.* 76. Hue and cry.
For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be attached and imprisoned by the law of the land. 2 *Inst.* 52.

But generally, no such cause of suspicion, as any of the above mentioned, will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry. 2 *Haw.* 76. Where no crime is committed.

III. By whom the arrest shall be made.

1. In criminal cases, a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept. Arrest without warrant.

2. Thus all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend By private person.

prehend the offender, on pain of being fined and imprisoned for their neglect. 2 *Haw.* 74.

Also, every private person is bound to assist an officer demanding his help, for the taking of a felon, or the suppressing of an affray. 2 *Haw.* 75.

Also by the vagrant act of 17 G. 2. Every private person may apprehend beggars and vagrants.

By watchman.

3. Also, a watchman may arrest a night walker, without any warrant from a magistrate. 2 *Inst.* 52.

By constables.

4. In like manner, a constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1 *H. H.* 587.

By any person whatsoever.

5. Or any person whatsoever, if an affray be made to the breach of the king's peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the king's peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.

Arrest with warrant :

6. So much concerning an arrest without a warrant; next follows arresting with such warrant.

By the sheriff or constable.

7. The warrant is ordinarily directed to the sheriff or constable, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it. 1 *H. H.* 581.

Sheriff may depute.

8. If it be directed to the sheriff, he may command his baliff, under-sheriff, or other sworn and known officer, to serve it, without writing any precept. But if he will command another man, that is no such officer, to serve it, he must give him a written precept, otherwise false imprisonment will lie. *Lamb.* 89.

Others cannot depute.

9. But every other person to whom it is directed, must personally execute it; yet it seems, that any one may lawfully assist him. 2 *Haw.* 86.

Where a constable may execute it out of his own district.

10. If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another; but if it be directed to a particular constable (*Mr. Hawkins* says, to a particular constable *by name*), he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. *Lord Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 86.

Any person may execute.

11. The justice that issues the warrant, may direct it to a private person if he pleaseth, and it is good; but he

is not compellable to execute it, unless he be a proper officer. 1 *H. H.* 581.

12. But by the justices oath, the warrant ought not to be directed to the party, but to some indifferent person, to execute it. But not to be directed to the party.

13. If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt.* Where directed to two jointly.
c. 169.

IV. The manner of an arrest.

1. The officer to whom a warrant is directed and delivered, ought with all speed and secrecy to find out the party, and then to execute the warrant. *Dalt.* c. 169. To be gone about immediately.

2. It is certainly an offence of a very high nature, to oppose one who lawfully endeavours to arrest another for treason or felony: And it seems, that the person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessory to the felony. 2 *Haw.* 121. Opposing the execution.

3. An arrest in the night is good, both at the suit of the king and of the subject; else the party may escape. Arresting in the night.
9 *Co.* 66.

4. By the 24 *G.* 2. c. 55. Constables and others may, on having the warrant indorsed by a justice in another county, into which an offender shall have escaped, arrest an offender in such other county, and carry him before a justice in such other county, if the offence is bailable, to find bail; or else shall carry him back again before a justice in the county from whence the warrant did first issue. Arresting in another county.

5. A private person cannot raise power to arrest or detain a felon. 1 *H. H.* 601. Taking the power of the county.

But any justice, or the sheriff, may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons; or such as do break, or go about to break, or disturb the king's peace: and every man being required, ought to assist and aid them, on pain of fine and imprisonment. *Dalt.* c. 171.

But it is not justifiable for a justice, sheriff, or other officer, to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without just cause. *Dalt.* c. 171.

But where a justice, sheriff or other officer, is enabled to take the power of the county, it seemeth they may command

command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other persons being above the age of fifteen years, and able to travel. *Dalt. c. 171.* Because, by the statute of *Winchester*, all of that age are bound to have harness.

But women, ecclesiastical persons, and such as be decrepit, or diseased, shall not be compelled to attend them. *Dalt. c. 171.*

And in such case it is referred to the discretion of the justice, sheriff, or other officer, what number they will have to attend on them, and how and after what manner they shall be armed or otherwise furnished. *Dalt. c. 171.*

Breaking open
doors.

6. As to the case of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never rallow of such extremities, but in cases of necessity; and therefore, that no one can justify the breaking open another's doors to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. 2 *Haw.* 86.

But where a person authorized to arrest another, who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors in the following instances:

(1) Upon a *capias* grounded on an indictment for any crime whatsoever; or upon any *capias* from the chancery or king's bench, to compel a man to find sureties for the peace or good behaviour. 2 *Haw.* 86.

(2) Where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person; but where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr *Hawkins* says) that no one can justify the breaking open doors in order to apprehend him: (And this opinion he founds on *Coke's 4 Inst.* 177. and *Hale's pleas of the crown* 91.) 2 *Haw.* 87.

But Lord *Hale*, in his history of the pleas of the crown, says, that upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed, may break open doors to take the person suspected, if upon demand he will not surrender himself, as well as if there had been an express and positive charge against him; and so (he says) hath the common practice obtained, notwithstanding the contrary opinion of lord *Coke*: for in such case the process is for the king, and therefore a

non omittas is implied. 1 *H. H.* 580, 583. 2 *H. H.* 117.

And as he may break open such person's own house, so much more may he break open the house of another to take him; for the sheriff may do upon a civil process: But then he must at his peril see that the felon be there; for if the felon be not there, he is a trespasser to the stranger whose house it is. 2 *H. H.* 117.

But it seems that he that arrests as a *private man* barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, that is, if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 *H. H.* 82.

But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it; and therefore they cannot break open doors; but in case of a constable he is punishable if he omit it upon complaint. 2 *H. H.* 92.

(3) Upon a warrant from a justice of the peace, to find sureties for the peace or good behaviour. 2 *Haw.* 86. 1 *H. H.* 582. 2 *H. H.* 117.

And in general, Mr *Dalton* says, an officer upon any warrant from a justice, either for the peace or good behaviour, or in any case where the king is party, may by force break open a man's house, to arrest the offender. *Dalt. c.* 169.

(4) On a warrant to search for stolen goods, the doors may be broken open, if the goods are there; and if they are not there, the constable seems indemnified, but he that made the suggestion, is punishable. 2 *H. H.* 151.

(5) Where forcible entry or detainer is found by inquisition before justices of the peace, or appears on their view. 2 *Haw.* 86.

(6) On a *capias utlagatum*, or *capias pro fine*. 2 *Haw.* 86.

(7) On the warrant of a justice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any statute, which gives the whole or any part of such forfeiture to the king. 2 *Haw.* 86.

(8) Where an affray is made in a house, in the view or hearing of the constable, he may break open the doors to take them. 1 *Haw.* 137. 2 *Haw.* 87.

(9) If

(9) If there be disorderly drinking or noise in a house, at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch, demanding entrance, and being refused, may break open the doors, to see and suppress the disorder. 2 *H. H.* 95.

(10) Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house. 2 *Haw.* 87.

(11) But upon a general warrant, without expressing any felony or treason, or surety of the peace, the officer cannot break open a door. 1 *H. H.* 584.

(12) Neither ought doors to be broken open to take a person, who is required to take certain oaths by virtue of a statute, because in such case the warrant is not grounded on a precedent offence. 2 *Haw.* 87. 12 *Co.* 131.

(13) In a civil suit; the officer cannot justify the breaking open an outward door or window in order to execute process. If he doth he is a trespasser. But if he findeth the outward door open, and entreth that way, or if the door be opened to him from within, and he entreth, he may break open inward doors if he findeth that necessary in order to execute his process. *Foist.* 319.

For a man's house is his castle, for safety and repose to himself and family; but if a stranger, who is not of the family, upon a pursuit taketh refuge in the house of another, this rule doth not extend to him, it is not his castle, he cannot claim the benefit of sanctuary therein. *Foist.* 320.

And it is always to be remembered, that this rule must be confined to the case of arrests upon process in civil suits only. For where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace; the party's own house is no sanctuary for him: in these cases, the justice which is due to the publick must supersede every pretence of private inconvenience. *id.*

(14) Finally, in all these cases, if an officer, to serve any warrant, enters into a house, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 *Haw.* 87.

7. If there be a warrant against a person, for a trespass or breach of the peace, and he flies and will not yield to the arrest, or being taken makes his escape; if the officer kills him it is murder. 2 *H. H.* 117.

But if such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer standing upon his guard,

Killing in the
arrest or pursuit.

kills him, this is no felony; for he is not bound to go back to the wall, as in common cases of *se defendendo*, for the law is his protection. 2 H. H. 118.

But where a warrant issueth against a person for felony, and either before arrest, or after, he flies and defends himself with stones or weapons, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kill him it is no felony. And the same law is, for a constable that doth it by virtue of his office, or on hue and cry. 2 H. H. 118.

But then there must be these cautions: 1. He must be a lawful officer; or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely that he cannot otherwise be taken. 2 H. H. 119.

But tho' a private person may arrest a felon; and if he fly so as he cannot be taken without he be killed, it is excusable in this case for the necessity; yet it is at his peril, that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for an innocent person is not bound to take notice of a private person's suspicion. 2 H. H. 119.

8. A person sworn and commonly known, and acting within his own precinct, need not shew his warrant; but he ought to acquaint the party with the substance of it. 2 Haw. 85. Whether the constable need to shew his warrant.

And an officer giveth sufficient notice what he is, when he saith to the party, I arrest you in the king's name; and in such case, the party at his peril ought to obey him, tho' he knoweth him not to be an officer; and if he have no lawful warrant, the party grieved may have his action of false imprisonment. *Dalt. c. 169.*

But the learned editor of *Hale's* history observes hereupon, that the books referred to intend the general warrant constituting such person an officer, as a bailiff, or the like, in a civil action; tho' it may be otherwise in case of felony, because in such case a private person may arrest a felon without any warrant at all. 2 H. H. 116.

But if he acts out of his precinct, or is not sworn and commonly known, he must shew his warrant if demanded. 2 Haw. 85, 86. Otherwise the party may make resistance, and needs not to obey it. *Dalt. c. 169.*

But if the constable has no warrant, but doth it by virtue of his office, as constable, it is sufficient to notify that he is constable, or that he arrests in the king's name. 1 *H. H.* 583.

But in the case of a warrant of distress, issued by a justice of the peace, for the levying a pecuniary forfeiture or sum of money, it is specially provided by the statute of the 27 *G. 2. c. 20.* that the officer executing the same, shall, if required, shew his warrant to the person whose goods are distrained, and shall suffer a copy thereof to be taken.

No arrest by words.

9. If the constable come unto the party, and require him to go before the justice, this is no arrest or imprisonment. *Dalt. c. 170.*

For bare words will not make an arrest without laying hold on the person. 1 *Salk.* 79. 2 *Haw.* 129.

Retaking after arrest.

10. It hath been holden, that if a constable, after he hath arrested the party by force of a warrant, suffer him to go at large, upon his promise to come again and find sureties, he cannot afterwards arrest him by force of the same warrant: However if the party return, and put himself again under the custody of the constable, it seems that it may be probably argued, that the constable may lawfully detain him, and bring him before the justice, in pursuance of such warrant; but in this the law doth not seem to be clearly settled. 2 *Haw.* 81.

But if the party arrested do escape, the officer upon fresh suit may take him again and again, so often as he escapeth, altho' he were out of view, or that he shall fly into another town or county. *Dalt. c. 169.*

V. What is to be done after the arrest.

By a private person.

1. When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do any of these three things:

(1) He may carry him to the common gaol; but that is now rarely done. 1 *H. H.* 589. 2 *H. H.* 77.

(2) He may deliver him to the constable, who may either carry him to gaol, or to a justice of the peace. 1 *H. H.* 589.

(3) He may carry him immediately to a justice of the peace. 1 *H. H.* 589.

2. If the constable, or his watch, hath arrested affrayers, By a watchman, or persons drinking in an alehouse disorderly at an unreasonable time of night, he may put the persons in the stocks, or in a prison if there be one in the vill, till the heat of their passion or intemperance is over, tho' he deliver them afterwards; or till he can bring them before a justice. 2 *H. H.* 95.

3. If the arrest is by virtue of a warrant, when the officer hath made the arrest, he is forthwith to bring the party, By an officer by warrant. according to the direction of the warrant: If it be to bring the party before the justice who granted the warrant specially, then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice of the county, then it is in the election of the officer, to bring him before what justice he thinks fit, and not in the election of the prisoner. 1 *H. H.* 582. 2 *H. H.* 112.

But if the time be unreasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick, he may secure him in the stocks, or in an house, till the next day, or such time as it may be reasonable to bring him. 2 *H. H.* 120.

And when he hath brought him to the justice, yet he is in law still in his custody, till the justice discharge, or bail, or commit him. 2 *H. H.* 120.

4. But it is said, the constable is not obliged to return the warrant itself, but may keep it for his own justification, Returning the warrant. in case he should be questioned for what he had done; but only to return what he has done upon it. *Lord Raym.* 1196.

5. And this seems to be implied in the statute of the 24 *G. 2. c. 44.* which enacteth, that no action shall be brought against any constable or other officer, or person acting by his order, and in his aid, for any thing done in obedience to the warrant of a justice of the peace, until demand hath been made, or left at the usual place of his abode, by the party, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand: And if, after compliance therewith, any such action shall be brought, without making the justice who signed the warrant defendant, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant. *f. 6.* And it is certain the constable cannot grant a perusal or copy of the warrant, unless he hath it in his custody. Constable indemnified.

Fee for arrest.

6. By an ancient statute, 23 H. 6. c. 10. No sheriff shall take for any arrest, but 20d. and the bailiff which maketh the arrest 4d. on pain of 40l. half to the king, and half to him that will sue in sessions (or the courts above) and treble damages to the party injured.

Upon which statute perhaps may be founded the custom in many places, of giving 4d. to the constable with the warrant, for his trouble in executing the same; which indeed at that time might be a reasonable satisfaction; for 4d. then was worth more than ten times the value of 4d. now. Which decrease in the value of money, in this and many other cases depending upon ancient statutes, may seem to require some consideration.

The rewards for arresting or apprehending highway-men and others, may be found under their respective titles.

Arson. See *Burning*.

Artificers. See *Servants*.

Assault and Battery.

I. Assault, what.

II. Battery, what.

III. In what cases they may be justified.

IV. How punished.

I. Assault, what.

ASSAULT, *assultus*, from the french *assayler*, is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him, at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatening manner. 1 *Haw.* 133.

And from hence it clearly follows, that one charged with an assault and battery, may be found guilty of the assault, and yet acquitted of the battery: But every battery includes an assault; therefore on an indictment of assault

fault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient.

1 *Haw.* 134.

Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault. 1 *Haw.* 134.

II. Battery, what.

Battery (from the Saxon *batte*, a club, or *beatan*, to beat, from whence cometh also the word *battle*) seemeth to be, when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like. 1 *Haw.* 134.

III. In what cases they may be justified.

A person may justify an assault, in defence of his person, or of his wife, or master, or parent, or child within age; and even a *wounding* may be justified in defence of his person, but not of his possessions. 3 *Salk.* 46.

Also if an officer having a lawful warrant lay hands on another to arrest him, or if a parent in a reasonable manner chastise his child, a master his servant, a schoolmaster his scholar, a gaoler his prisoner, and even a husband his wife as some say; or if one confine a friend who is mad, and bind and beat him in such a manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another therewith; in all these cases, and such like, it is justifiable. 1 *Haw.* 130.

Likewise a person may justify in assault and battery of another, who doth menace or assault him, and attempt to beat him from his lawful watercourse or highway. *Pult.* 42.

Likewise, if a person comes into my house, and will not go out, I may justify laying hold of him, and turning him out. *Nelf.* Assault.

And where a man in his own defence beats another who first assaults him, he may take advantage thereof, both upon an indictment, and upon an action; but with this difference, that on an indictment he may give it in evidence upon the plea of not guilty, but on an action he must plead it specially. 1 *Haw.* 134.

Assault and Battery.

IV. How punished.

There is no doubt but that the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Haw.* 134.

And by 6 *G. c. 23. f. 11.* Assaulting in the street or highway, with intent to spoil peoples cloaths, and so spoiling them, is felony and transportation.

And by 7 *G. 2. c. 21.* Assaulting with intent to rob, is also made felony and transportation.

And by 9 *Ann. c. 16.* Assaulting a privy counsellor in the execution of his office, is felony without benefit of clergy.

A private assault is not inquirably in the leet, not being a common nuisance, as all affrays are. 1 *Haw.* 135.

Warrant for an assault.

Westmorland. { To the constable of——.

WHEREAS complaint hath been made before me J. P. Esquire, one of his majesty's justices of the peace in and for the said county, upon the oath of A. I. of—— in the said county, taylor, that A. O. of—— aforesaid, butcher, did on the—— day of—— violently assault and beat him the said A. I. at—— aforesaid in the county aforesaid: These are therefore in his said majesty's name, to command you forthwith to apprehend the said A. O. and to bring him before me to answer unto the said complaint, and to be further dealt withal according to law. Given under my hand and seal the—— day of, &c.

Indictment for an assault.

THE jurors for our lord the king upon their oath present, that A. O. of—— in the said county, butcher, on the—— day of—— in the—— year of the reign of—— at—— aforesaid in the county aforesaid, in and upon A. I. taylor, then and there being in the peace of god and of our said lord the king, with force and arms, an assault did make, and him the said A. I. then and there did beat, wound, and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the said A. I.
and

and to the evil example of all others offending in the like kind, and against the peace of our said lord the king, his crown and dignity.

Assizes.

1. **A**SSISE (*assisa*) anciently signified in general, a Affize, what: court where the judges or assisors heard and determined causes; and more particularly upon writs of *assize* brought before them, by such as were wrongfully put out of their possessions. Which writs heretofore were very frequent; but now mens possessions are more easily recovered by ejectments, and the like. Yet still the judges in their circuits have a commission of *assize*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs.

2. To which commission of *assize*, four other commissions are now superadded; to wit, The circuit commissions,

(1) A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol.

(2) A commission of *oyer and terminer*, directed to the judges, and many other gentlemen of the county; by which they are empowered to hear and determine treasons, felonies, and other misdemeanors, by whomsoever committed, whether the persons to be tried be in gaol or not in gaol.

(3) A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

(4) A commission of the *peace* in every county of their circuit.

3. By the precept for the general gaol delivery above-mentioned, the sheriff is commanded to attend there in person, with his under-sheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their

Sheriffs, justices, and others to attend there.

own persons with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done.

By virtue whereof, all justices of the peace, mayors, and others abovementioned, of that county where the judges have their assizes, are bound to be present; and if they make default, without lawful impediment, the judges may set a fine upon them for their neglect. *Cr. Circ. 4.*

Constables' presentment.

4. Also, by ancient custom (that is, by the common law of the land) before the coming of the judges, the high constables issue their warrants to the petty constables, to make presentments of all crimes and offences cognizable at the assizes; to the intent (as it seemeth) that the judges thereby may have a general information and knowledge, how the peace hath been kept: which presentments being delivered to the high constables, are by them delivered into court, and make up part of the rolls, and other remembrances abovementioned.

Which said warrants of the high constables perhaps may be best drawn upon the words of the commission of oyer and terminer, which is the largest of all the five commissions abovementioned: And then the form thereof may be thus;

Westmorland, } To the constable of —— in the said
East Ward. } county.

THESE are to require you the said constable, in his majesty's name, to make out a presentment in writing of all treasons, misprisions of treasons, insurrections, rebellions; counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain, and of other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughter, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenance, oppressions, champerty, deceits, and all other evil doings, offences, and injuries whatsoever; and also the accessaries of them; by whomsoever, and in what manner soever, done, committed or perpetrated, within your constableness. Which said presentment so made in writing as aforesaid, and signed by you, you are to deliver to me at —— in the said county, on —— the —— day of —— at the hour of —— in the forenoon of the same day, that I may have the said presentment ready to be delivered to his said majesty's justices of oyer and terminer and general gaol delivery at the

the next affises to be holden for the said county. Herein fail you not, as you will answer the contrary at your peril. Given under my hand, the——day of——in the year of our lord——.

John Bowness, *High Constable.*

Attachment.

THIS word, as a law term, we have immediately from the French *attacher*, to tye, or make fast. The Italian word is *attacare*; the Spanish *attacar*; and the Saxon *tæcan*, to take.

It signifieth the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of *Westminster hall*, and above all the court of king's bench, may proceed in a summary manner, according to their discretion. 2 *Haw.* 141.

But in the case of *K. and Bartlett*, *H. 8 G. 2.* it is said that generally the sessions have not a power to award an attachment; but the court said, they would not determine how it would have been, if they had committed the person for contempt; but the ordinary and proper method is, by indictment. *Sess. Ca. V. 2.* 176.

Attainder.

THE difference between a man attainted and convicted is, that a man is said to be convicted before he hath judgment, as if a man be convicted by verdict or confession; and when he hath his judgment upon the verdict or confession, then he is said to be attainted. 1 *Inst.* 390.

That is to say, his blood is become (*attinctus*) tainted, stained, or corrupted: insomuch that by the common law, in cases of treason or felony, his children or other kindred cannot inherit his estate, nor his wife claim her dower; and the same cannot be restored or saved, but by act of parliament; and therefore in divers instances, there is a special provision by act of parliament, that such or such

an attainder shall not work corruption of blood, loss of dower, nor disherison of heirs.

Attaint.

ATTAINT is a writ that lieth, where a false verdict in a court of record, upon an issue joined by the parties, is given. *1 Inst.* 294. Which is treated of under title *Jurors*.

Attorney.

Who.

1. **A**N attorney is one who is appointed to do any thing, in the *turn*, stead, or place of another. *1 Inst.* 51.

Justice of the
peace not to act
as attorney.

2. No attorney or solicitor shall be capable to continue or be a justice of the peace, during such time as he shall continue in the business and practice of an attorney or solicitor. *5 G. 2. c. 18. s. 2.*

Under-sheriff.

3. No under-sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall be attorney in the king's courts, during the time that he is in office with any such sheriff. *1 H. 5. c. 4.*

Steward of a
franchise.

4. No steward, bailiff, nor minister of lords of franchises, which have return of writs, shall be attorney in any plea within the franchise or bailiwick, whereof he shall be officer. *4 H. 4. c. 19.*

Recusant.

5. No recusant convict shall practise as an attorney or solicitor; on pain of 100 l. half to the king, and half to him that shall sue. *3 7. c. 5. s. 8.*

Person convicted
of barratry, or
other crime.

6. If any person, who hath been convicted of forgery, perjury, or subornation of perjury, or common barratry, shall practise as an attorney or solicitor; he shall be transported for seven years. *12 G. c. 29. s. 4.*

To be bound for
5 years.

7. No person shall act as attorney or solicitor, unless he shall have been bound for five years. *2 G. 2. c. 23. s. 5, 6.*

Affidavit to be
made thereof.

8. And every person bound to serve as clerk to any attorney or solicitor, shall within three months cause an affidavit to be made of the actual execution of the contract; in which affidavit shall be specified, the name of the

the attorney or solicitor and of the person so bound, their places of abode, and the day of the date of such contract: such affidavit to be filed within the said time, in the court where the attorney or solicitor is inrolled. 22 G. 2. c. 46. f. 3.

But there is generally an indemnifying clause in some act every two or three years, for relief of persons who have omitted to cause such affidavits to be made and filed, provided they cause the same to be done within a time therein limited; which by the 5 G. 3. c. 40. was to be on or before Oct. 10. 1765.

And no person so bound shall be admitted or inrolled an attorney or solicitor, before such affidavit so filed shall be produced and openly read in court. 22 G. 2. c. 46. f. 4.

9. And such clerk shall, during the whole time of service specified in the contract, continue and be actually employed by such attorney or solicitor or his agent, in the proper business of an attorney or solicitor. 22 G. 2. c. 46. f. 8. Actual service for the whole 5 years.

Provided, that if the master shall die or discontinue his practice, or if the contract shall by consent be cancelled, or such clerk be discharged by order of court; the clerk may be bound, during the residue of the term to another master: so as affidavit be made and filed as aforesaid, of the execution of such second or other contract. f. 9.

And such clerk, before he shall be admitted attorney or solicitor, shall cause an affidavit of himself, or of the attorney or solicitor to whom he was bound, to be made and filed as aforesaid, that he hath actually and really served and been employed by such practising attorney or solicitor or his agent, during the said whole term of five years. f. 10.

10. One of the judges in the courts of law; and the master of the rolls, or two masters in chancery, and a judge of the other courts of equity respectively;—shall examine any person touching his fitness and capacity to be an attorney or solicitor: and if approved of, he shall be sworn in open court, and admitted, and inrolled, without fee, except 1 s. for administering the oath. Which admission (on a treble 40 s. stamp) shall be signed, and delivered to him. 2 G. 2. c. 23. f. 2, 5, 6. Swearing and admission.

And the attorney's oath shall be this: "I A. B. do swear, that I will truly and honestly demean my self in the practice of an attorney, according to the best of my knowledge and ability; so help me god." f. 13.

The solicitor's oath: " I A. B. do swear, that I will
 " truly and honestly demean my self in the practice of a
 " solicitor, according to the best of my knowledge and
 " ability; so help me god." *f.* 14.

Penalty of acting
 before inrolled.

11. If any person shall act as attorney or solicitor, for
 or in expectation of any gain or reward, without being
 admitted and inrolled as aforesaid; he shall forfeit 50 l,
 and be incapable to act for the future: The said penalty
 to be recovered in any of the courts of record at *West-*
minster, or in the counties palatine respectively, or great
 sessions in Wales, or at the assizes or sessions, by any per-
 son who shall sue for the same within 12 months, toge-
 ther with treble costs; and no proceedings thereupon shall
 be removed before judgment, or stayed by any certiorari
 or other writ. 2 *G.* 2. *c.* 23. *f.* 24, 25.

And by the 7 & 8 *W.* *c.* 24. Any attorney or soli-
 citor, acting as such, before he hath taken the oaths and
 subscribed the declaration, as other persons qualifying for
 offices, shall incur a praemunire.

To have no more
 than two clerks.

12. No attorney or solicitor shall have more than two
 clerks at any one time. 2 *G.* 2. *c.* 23. *f.* 15.

Except the prothonotaries in the common pleas, and
 the secondary in the king's bench, and the several pro-
 thonotories in the counties palatine, and great sessions in
 Wales; each of whom may have three, who shall be
 bound and serve for such time as aforesaid, and examined,
 admitted, and inrolled, as other persons who have served
 to a sworn attorney. *f.* 16.

Attorney may
 be admitted a
 solicitor.

13. A sworn attorney may, on examination as aforesaid,
 be admitted, sworn, and inrolled a solicitor, in any
 of the courts of equity, without fee or stamp. 2 *G.* 2.
c. 23. *f.* 20.

Solicitor may be
 admitted an at-
 torney.

14. In like manner, a sworn solicitor may be admitted,
 sworn, and inrolled an attorney, in the king's bench or
 common pleas. 23 *G.* 2. *c.* 26. *f.* 15.

May be admitted
 in other courts.

15. So also, a sworn solicitor in any of the courts of
 equity may, on examination as aforesaid, be admitted,
 sworn, and inrolled, in any other court of equity, with-
 out fee or stamp. 2 *G.* 2. *c.* 23. *f.* 21.

May act in the
 name of any
 other attorney.

16. And any attorney or solicitor in any of the courts
 respectively, may, with the consent in writing of an at-
 torney in any other court, in the name of such attorney,
 sue out any process, and carry on any suit, in such court;
 notwithstanding he is not sworn and admitted to be an
 attorney of such court. 2 *G.* 2. *c.* 23. *f.* 10.

May act in infe-
 rior courts of re-
 cord.

17. And any person, who hath been admitted an at-
 torney in any of his majesty's courts of record at *West-*
minster,

minster, shall be capable of being admitted to practise as an attorney in any inferior court of record; provided he be in all other respects qualified according to the custom of such inferior court. 6 G. 2. c. 27.

18. No person shall act as attorney, solicitor, or agent, at any general or quarter sessions of the peace, without being duly inrolled; on pain of 50 l. to him who shall sue in 12 months, with treble costs: and if any attorney or solicitor shall permit him to make use of his name in such sessions, he shall forfeit 50 l. in like manner. 22 G. 2. c. 46. f. 12. Persons unqualified not to act in the sessions.

And no clerk of the peace or his deputy, or any under-sheriff or his deputy, shall act as solicitor, attorney, or agent, at any general or quarter sessions of the peace of the county or place where he shall execute his said office respectively, on pain of 50 l. in like manner. f. 14.

19. A person acting as attorney or solicitor in the county court, without having been legally admitted; shall forfeit 20 l. with costs, to him who shall sue in 12 months in any of his majesty's courts of record. 12 G. 2. c. 13. f. 7. Nor in the county court.

20. An attorney, in respect of his attendance at the court, cannot be pressed for a soldier. *Comyns' Dig. Attorney.* Privilege.

Nor shall be made constable, tho' there be a custom that every inhabitant shall be chosen in his turn. *id.*

And, in general, it is said, that he shall not be elected into any other office, against his will; as to the office of overseer of the poor; or churchwarden; or any office within a borough. *id.*

So he shall not be chosen collector of the lord's rent within a manor, where it is copyhold; tho' it be part of his tenure. *id.*

So he shall not be amerced for not doing his suit at the lord's court, when his attendance at Westminster is required. *id.*

Yet it hath been said, that an attorney shall not be excused by privilege from offices, which may be executed by deputy; but only those which require personal duty. *Comyns. ibid. March. 30.*

If an attorney be denied his privilege, he may have a writ of privilege for his discharge. 2 *Haw. 63.*

21. If any attorney be notoriously found in any default, of record, or otherwise; he shall forswear the court, and never after be received to make any suit in any court of the king. 4 *H. 4. c. 18.* Misbehaviour.

And therefore, where an attorney sued out a *capias*, without an original; he was struck out of the roll, and sworn, that he be not an attorney in any of the king's courts. *Comyns' Dig. Attorney.*

So an attorney, who gave names to the sheriff to be returned upon a jury, was cast over the bar. *id.*

So if he takes money of his client, and afterwards wholly refuses to intermeddle with his business; he shall be struck out of the roll. *id.*

If he refuse a re-delivery of writings intrusted to his perusal, tho' some of them concern himself principally; the court, upon motion, will compel him to re-deliver them, on payment of all due to him in the cause for which they were delivered; for if the writings were delivered for a special purpose, he shall not detain them for another demand. *id.*

And the court will award an attachment against him, for bad and fraudulent practice; and he shall pay costs thereupon, or shall be committed: But an attachment will not be granted before a day allowed to shew cause. *id.*

Acting when
under confine-
ment.

22. No attorney or solicitor, being a prisoner, shall, in his own name, or in the name of any other attorney, during his confinement, sue out any writ or process, or commence any action; on pain that such proceedings shall be void, and he shall be incapacitated to act as attorney or solicitor for the future; and any attorney or solicitor permitting or empowering him to do so in his name, shall be in like manner incapacitated. 12 G. 2. c. 13.
§. 9.

Provided, that such person so confined may carry on or transact any suit commenced before his confinement.
§. 10.

Name to be in-
scribed on writs
or other process.

23. Every writ and process for arresting the body, and every writ of execution, or some label annexed to such writ or process, and every warrant to be made out thereupon, shall be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor; and where such person shall not be immediately employed by the plaintiff, then also with the name of the attorney or solicitor immediately employed: And every copy of any writ to be served on the defendant shall be subscribed or indorsed, with the name of the attorney or solicitor immediately employed. 2 G. 2. c. 23. §. 22.

But the not subscribing or indorsing the name of the attorney, clerk in court, or solicitor, on the warrant made out on the process, shall not vitiate the same; provided the

the writ be subscribed or indorsed : but the sheriff making out such warrant, and not subscribing or indorsing the name of the attorney, clerk in court, or solicitor, who sued out the same, shall forfeit 5*l*; to be assessed upon him as a fine, by the court out of which the process issued ; half to the king, and half to the party aggrieved by such omission. 12 G. 2. c. 13. *f.* 4.

24. If any sworn attorney or solicitor shall knowingly act as agent for any person not qualified ; he shall, on proof thereof to the court in a summary way, be struck off the roll and incapacitated ; and such unqualified person shall be committed to the prison of the court, for any time not exceeding one year. 22 G. 2. c. 46. *f.* 11.

Acting for a person unqualified.

25. If any sworn attorney shall knowingly suffer any person, not being a sworn attorney or solicitor, to act in his name ; he shall be incapable to act as an attorney. 2 G. 2. c. 23. *f.* 17.

Suffering a person unqualified to act in his name.

26. If any attorney or solicitor shall willingly delay his client's suit, to work his own gain ; the party grieved shall have his action for the same, and recover costs and treble damages ; and the said attorney and solicitor shall be discharged from being an attorney or solicitor any more. 3 *J.* c. 7.

Suffering wilful delay.

27. All attorneys and solicitors shall give a true bill unto their clients subscribed with their own hands and names, before they shall charge their clients with their fees or charges. 3 *J.* c. 7.

To deliver a bill signed.

28. And if any attorney or solicitor shall demand by his bill any other sum of money, or allowance upon his account of any money, which he hath not laid out ; the party grieved shall have his action for the same, and recover costs and treble damages ; and such attorney or solicitor shall be discharged and incapacitated. 3 *J.* c. 7.

Penalty for a wrong charge.

29. No attorney or solicitor shall sue for recovery of his fees, until after one month from the time of delivering the bill signed. 2 G. 2. c. 23. *f.* 23.

Client to have a month to pay in.

30. And the client, on submission to pay the whole sum that on taxation shall appear due, may have the bill taxed by the proper officer. And if the attorney or solicitor, or the party charged, having due notice, shall not attend the taxation ; the officer may proceed to tax the bill ex parte : (And no suit shall be commenced for the said fees during the taxation.) And on taxation and settlement of the bill, the party shall forthwith pay to the said attorney or solicitor, or to any person by him authorized who shall be present at the taxation, or otherwise as the court shall direct, the whole sum that shall be

Taxation.

found due ; and in default thereof, the party shall be liable to an attachment, or to such proceedings at the election of the attorney or solicitor as the party shall be otherwise liable to by law. And if it appear on the taxation, that the attorney or solicitor hath been overpaid ; he shall forthwith refund, on pain of attachment, or such other proceedings as aforesaid. If the bill taxed be less by a sixth part than the bill delivered ; the attorney or solicitor shall pay the costs of taxation : But if it shall not be less, the court shall charge the attorney or client according to their discretion. 2 G. 2. c. 23. §. 23.

Provided, that the said act shall not extend to any bill of fees due from any attorney or solicitor, to any other attorney or solicitor or clerk in court ; but they may use such remedies for the recovery thereof, as they might have done before the making of the said act. 12 G. 2. c. 13. §. 6.

Award.

IT is judged not foreign to the office of a keeper of the peace, to have some knowledge of the law contained under this title : Concerning which we will shew,

- I. What things may be submitted to arbitration.*
- II. The several kinds of submission to arbitration.*
- III. The award ; and therein what shall be deemed a good award, and what not.*

I. What things may be submitted to arbitration.

Actions personal. 1. It is held clearly, that all matters of controversy, either of fact, or of a right in things and actions personal and uncertain, may be submitted to arbitration. 9 Co. 78.

Matters of freehold. 2. Matters of freehold, or any right and title to a freehold, cannot be submitted to arbitrament ; for a freehold is not transferrable from one to another, without livery and seisin : Yet if there be a submission concerning the right, title, or possession of lands and tenements, and the parties enter into mutual bonds, to stand to the award made relating to them, they forfeit their bonds unless they obey it. 1 Roll. Abr. 242, 244. Read. Arb. Wood, b. 4. c. 3.

So if the condition of an obligation is, to stand to an award touching lands; and the arbitrator awards the land to one, and that the other shall release to him: if he doth not release, the obligation is forfeited. 1 *Bac. Abr. Arbitrament. A.*

But if the arbitrator awards the land to one, it seems the obligation is not forfeited, tho' the order do not convey to him to make him a good title; for the arbitrator hath not awarded any act to be done by the party, and the award itself cannot transfer the right, and so must be void, and then the condition of the obligation cannot be forfeited: for the awarding the land to one, cannot be expounded, that the other shall infeof him. *id.*

And altho' there be no bond, yet if the arbitrator do award that the one shall infeof the other; it seems that an action on the case may be maintained for not doing it: for the award in itself is as good as if there were a bond, and then there is the same reason an action should lie, as that the condition of the obligation should be forfeited; for if such an award were void, then the condition of the obligation to perform it could not be broken. *id.*

In like manner, an annuity is not determinable by award; for it is reckoned in nature of a freehold, and therefore cannot pass without the deed of the party. *id.*

So a partition cannot be made by award; for a freehold cannot pass (as was said) without livery and seisin. *id.*

It hath been doubted, whether leases for years, being chattels real, could be transferred by award; therefore it seems safest, when the controversy relates to these, that the parties be bound in mutual obligations to perform the award: and then, if the arbitrators award, that one shall assign or transfer the lease to the other; if he refuseth, he forfeits his obligation. *id.*

3. Debts on arrearsages of accounts before auditors, shall not be discharged by award; because it appears of record, and must be discharged by matters of as high a nature. 1 *Bac. Abr. Arbitrament. A.*

4. Debts due by specialty cannot be discharged by a bare award; but if the submission was by bond, the award would be a good bar; for one specialty may be dissolved by another. 1 *Bac. Abr. Arbitrament. A.*

5. A certain and fixed debt is not discharged by an award; for the end and design of an arbitration is, to reduce uncertain debts and duties to a certainty: and to award a man a certain debt, is to give him no more, nor do any greater thing for him, than was done before; for now he can have but an action, and that he might have before;

before; and to give him less than he had before, is to do him a manifest injustice, which the arbitrator cannot do.
1 Bac. Abr. Arbitrament. A.

But if 20l. be due to a man, and he and another submit all personal things to arbitration; there; if the arbitrator award 10l. it is a good award: because there were other uncertain things submitted, and the arbitrator had consideration of all, and set one against the other in making the award; so as perhaps the debt of 20l. was diminished, in consideration of some trespasses done by him to the other party. *id.*

Criminal offences.

6. Criminal matters, as treasons, murders, felonies, and other offences indictable at the suit of the king, cannot be submitted to arbitrament; for it is for the good of the commonwealth, that such offenders be made known and punished: and the king in such cases is a party, for whom the other parties cannot undertake. And altho' the submission be by bond, yet the obligation is void; and the parties may be punished for entering into such bonds.
1 Bac. Abr. Arbitrament. A.

But if the party injured proceeds by way of action, as he may in assaults and batteries, libels, and the like; the damages he sustained or expects to recover, may be submitted to arbitration: for in such case the action is for himself, and not for the king. *Compleat Arbitrator 28.*

Matrimonial causes.

7. Also matrimonial causes, or any thing concerning the contract or dissolution of marriage, cannot be submitted to arbitrament. *1 Roll's Abr. 252.*

But the damages a person sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted. *16 Ed. 4. 2.*

II. The several kinds of submission to arbitration.

By parol.

1. A submission by *words* is good, and the party in whose favour the award is made, hath a remedy to enforce a performance of it: Yet it is not expedient that any submission should be by parol, because the party may revoke it at pleasure, at any time before the award made, and that by word likewise; and the judges will rarely enforce the performance of an award, when either the submission or the award is by parol, because it lays so great a foundation for perjury. *Compl. Abr. 21.*

By covenant.

2. Submission may also be by *covenant*; but this method is seldom used: for tho' it contains the same certainty with a bond, yet the method of suing on a covenant is different, and

and more difficult than in suing on a bond. *Compl. Arb.* 7. 46.

3. Submission by *rule of court* (A) is made in pursu- By rule of court,
ance of the statute 9 & 10 W. c. 15. which enacteth as
follows:

It shall be lawful for all merchants and traders, and others desiring to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action, or suit in equity) by arbitration, to agree that their submission to the award or umpirage be made a rule of any of his majesty's courts of record, which the parties shall choose, and to insert such agreement in their submission, or the condition of the bond or promise, whereby they submit themselves: Which agreement being so made, and inserted in their submission or promise, or condition of their respective bonds, shall or may, on producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court; and a rule shall thereupon be made in the said court, that the parties shall submit to, and finally be concluded by such arbitration or umpirage; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court; and the court on motion shall issue process accordingly; which process shall not be stopped or delayed in its execution, by any order of any other court of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award was procured by corruption, or other undue means.

And this is allowed to be the most expeditious way; and the method is to get a counsel to move in any of the courts to have it made a rule, which in such case is never denied; and then the party is liable to the same penalties that he would be for disobeying any other rule of court. *Compl. Arb.* 6, 47.

4. Or lastly, the submission may be by bond (B). In By bond,
which case each party must give to the other a bond; which bond, and condition, must contain exactly the same words, only changing the names of the Parties. And the penalty of the bond should at least be the value of the thing submitted; so that the party may rather abide by the award, than forfeit his obligation. *Compl. Arb.* 46.

And undoubtedly a submission by bond in some respects, exceeds a submission by rule of court; for an award made pursuant to bonds of submission, may bind the parties executors; but if the party who refuses to perform an award made pursuant to a rule of court, shall die, the act of parliament directing, that the prosecution shall be carried on by attachment, the remedy being lost, the award is lost likewise. *Compl. Arb.* 34.

Both by bond and rule of court.

5. Sometimes the submission is both by bond and rule of court, by adding the party's consent at the bottom of the condition of the bond; and this is still the best way, for then the party may proceed which way he pleases: and it is said, that he may proceed both ways; that is to say, both on the bond, and have an attachment likewise for the contempt. *1 Salk.* 73.

Whether the submission may be countermanded.

6. But in which way soever the submission is made, the same nevertheless may be revoked, tho' made irrevocable by the strongest words; for a man cannot by his own act, make such authority or power not countermandable, which by the law and in its own nature is countermandable. *8 Co.* 82.

But if the submission be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he shall stand to and abide the award. And if he revokes, he must likewise give notice of the revocation; and if the submission was by bond, the revocation must be in writing. *8 Co.* 82.

And if the submission be made a rule of court, pursuant to the act of parliament; if either of the parties revokes, the court will grant an attachment. *Compl. Arb.* 82.

But if the submission be by word, the party may revoke at pleasure, and he forfeits nothing; but he must in this case likewise give notice of the revocation, tho' it need not be in writing; and the notice must be to the arbitrators themselves. *8 Co.* 82.

III. The award (C); and therein what shall be deemed a good award, and what not.

Arbitrators cannot administer an oath.

1. The arbitrators cannot injoin an oath to the witnesses, there being no law which gives them any such power.

Award best to be in writing.

2. It is highly convenient that the award be in writing, and so to be mentioned in the submission. *Compl. Arb.* 34.

3. It

3. It is not required by any of the stamp acts, that an award by name shall be on stamped paper or parchment; nor doth it seem to be comprehended under any description in the said acts, unless it be under these general words [*obligatory instrument*]; and if so, then it shall be on a double six-penny stamp. Whether it shall be upon stamp.

4. One thing essential to a good award is, that it be made with respect to persons and things, according to the submission. *Wood b. 4. c. 3.* Award to be according to the submission.

Upon which ground, as the arbitrators are, with respect to the things submitted, circumscribed and tied down to the submission; so in several cases it has been disputed, whether their awarding releases to the time of the award, and not to the time of the submission, was good; it is therefore most advisable to award releases to the time of the submission; tho' it is now clearly held, that general releases shall extend only to the time of the submission, and that, if there be releases awarded to the time of the award, they shall be good, unless it be shewn on the other side, that some new matter hath arisen between the parties between the submission and award. *1 Roll. Abr. 242. 6 Mod. 34.*

That is to say, an award of releases to the time of making the award, includes all that is within the submission, and more; which shall be good for so much as is within the submission, and void for the residue. *1 Bac. Abr. Arbitrament. E.*

If the submission be, *so as the award be ready to be delivered to the parties or to such of them as shall desire the same*, the parties so bound are themselves obliged to take notice of the award at their peril; but if the words of the submission be, *so that the award be delivered to each party by such a day*, then it must be delivered to each party accordingly. *Read. Arb. Wood b. 4. c. 3.*

But tho' the words of the submission may be such, as will oblige the parties to take notice of the award at their peril; yet if the arbitrators award that one of the parties shall do an act, which depends upon another first to be done of the other party, he must have notice of it; at least the party who would take advantage of it, must shew that he hath done what was necessary on his part. *Compl. Arb. 12.*

An award that one shall pay for the writings of the award, or the reckoning in the house where the award was made, is a void award; for such things lie plainly out of the submission. *1 Roll. Abr. 254.*

Award to be beneficial to either party.

5. Also, it is required, that the award be beneficial, and appoint something advantageous to either party; for an award of one side only, is not good: so if an award be, that one of the parties shall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Wood b. 4. c. 3.*

So if a man and woman submit themselves to an award, it is no good award that they shall *intermarry*, for this is not intended any advantage. *1 Roll. Abr. 252.* And the bodies of the parties are not submitted to arbitration. *1 Bac. Abr. Arbitrament. E.*

Where an award was, that the defendant should pay to the plaintiff two sums at several times, and that several releases should be given presently; it was objected, that by giving such releases the bond and money would be discharged, and therefore the awarding the release was void against the plaintiff, and so there is nothing of his side to be done: And of this opinion was the court. But where the award was, that money should be paid at two several days, and releases given, so that it appears by the very method and order of the award, that the general releases were not to be given till after the money paid; the court were clear of opinion, that it was well enough, and so judgment was given for the plaintiff. *2 Mod. 169.*

Award to be possible and lawful.

6. Also it is required in a good award, that it be possible and lawful. *Wood b. 4. c. 3.*

Thus, if an award be, that one of the parties shall kill, steal, forge a deed, or the like, it is void. *1 Inst. 206.*

In like manner, if it be awarded, that money shall be paid to an infant, and that he shall make a release, it is void; for the infant's release is not good in law.

Also it is held, that where a thing is awarded to be done, which afterwards becomes impossible by the act of god, the party is excused; as if an award be, to deliver a horse before such a day, and he dies before that day. *21 Ed. 4. 70.*

Award to be certain and final.

7. Also it is required, that the award be certain and final. *Wood b. 4. c. 3.*

Upon which ground it hath been resolved, that if the arbitrators award, that one of the parties beg the other's pardon before such a mayor, or such and such persons, it is good and certain enough; but if the award be, that he shall beg pardon in such manner and in such place as the other party shall appoint, it is not good: for the arbitrators are to determine, and not to make such party his own judge in his own cause. And tho' the time and place

be

be but circumstances, yet in this sort of satisfaction they make the most considerable part. 1 *Salk.* 71.

Upon which ground also, the arbitrators cannot regularly reserve any thing for their future judgment, when the time allowed them is expired; for then such their award is not certain and final. *Cro. Jac.* 585.

An award that the defendant shall give security to the plaintiff, for payment of a sum of money, is void for the uncertainty; not shewing what security he should give, whether by bond or otherwise. *Cro. Jac.* 314.

In the case of *Winter and Garlick*, T. 3 *An.* it was awarded, that the defendant should pay to the plaintiff 10 l. and all the costs of a suit then depending in an inferior court, and afterwards to give mutual releases. By the court: An award to pay such costs as the master shall tax is good, because it may be reduced to a certainty; but this is uncertain, and carries it farther than has hitherto been allowed. And *Holt* chief justice said, that it hath been held a good award, to pay such costs as the prothonotary shall tax, and that carries it far enough; but that surely the arbitrators should either ascertain it themselves, or refer it to a proper officer. 1 *Salk.* 75. 6 *Med.* 195.

But in the case of *Dudley and Nettleford*, H. 13 G. where it was awarded, that the plaintiff should pay the costs, and no body was appointed to tax them, the court supplied it by ordering the master to do it. *Str.* 737.

8. It is settled that arbitrators cannot proceed on a reference, after they have once named an umpire; for then their authority ceaseth, tho' the time for making the award is not expired. *Rep. of Pract. in C. B.* 116. *Danes and Monfay*. E. 8 G. 2.

Arbitrators cannot proceed, after appointing an umpire.

But the appointment of an umpire before their own time for making an award is expired, may be good: As in the case of *Doyly and Pitfée*, T. 28 G. 2. An action of debt was brought upon a bond, conditioned that the parties should submit to the award of two arbitrators, provided they made their award on or before the 13th of March next; and if they made no award, then that they should appoint an umpire before the 17th of the said March. The defendant pleaded, that no award was made on or before the said 13th day of March; but that they did, before the said 17th of March, to wit, upon the 11th, chuse and appoint an umpire, who had made an award. By the court: There are no words, which by any construction can be intended to limit or circumscribe the elec-

tion of an umpire till after the 13th of March. The plain sense of the submission is, that they should make their award by a certain day; or in case they did not make it, or could not agree, that then they should nominate an umpire. And they said, the court has not been nice in construing the time of the umpire's appointment, provided it was soon enough for him to make his award.

Award to be construed favourably, except in case of partiality or corruption.

9. Generally the award shall be expounded according to the intent of the arbitrators, and not literally, and shall not be unravelled in a court of equity, unless there was corruption in the arbitrators. 10 Co. 57. *Wood b. 4. c. 3. Read. Arb.*

But in the case of corruption, or other unfair practice, it is enacted by the aforesaid statute of 9 & 10 W. c. 15. that any arbitration or umpirage procured by corruption or undue means, shall be deemed void, and accordingly be set aside by any court of law or equity, so as complaint thereof be made in the court where the rule is made, before the last day of the next term after publishing the arbitration. *f. 2.*

But otherwise, as the arbitrators are persons of the parties own chusing, and as the law presumes that every man will be so wise as to pitch upon a person whose understanding and honesty he can rely on; it hath seldom happened, that an award was held void when there appeared nothing else to vitiate it, especially in a court of law: yet awards have been, and are often set aside in a court of equity, for corruption and want of understanding in the arbitrators. *Compl. Arb. 73.*

Therefore it is the interest of both parties, to chuse men of honesty and understanding to be their arbitrators, and to acquaint them truly with the facts they are to go upon: for if they appear to be mistaken in a matter of fact, a court of equity will set aside the award. 2 Vern. 705.

So if the arbitrators, or any of them, appear to have been deceived: As where certain articles were shewn only to one of the arbitrators, and he to whom they were not shewn swore that if he had seen them, he believed he should not have made such an award. For in such case, the award (according to the expression in the statute) is procured by *undue means*. *Tracy Atkins 64.*

If a submission is to three arbitrators, or any two of them, and two of them by fraud or force will exclude the other; that alone is sufficient to vitiate the award: or if they have private meetings, and admit one of the parties,

parties, but give no notice to the other, but suffer the attorney of the party, whom they admitted, to draw up the award; such award shall be set aside for partiality and unfairness. 2 *Vern.* 514.

It is a general rule in equity, that when it appears that any one of the arbitrators was any way *interested* in the matters in controversy, the award is to be set aside. *Compl. Arb.* 75.

And it is the strongest argument of partiality, to shew that the arbitrators received from either of the parties any considerable sum of money, or any other present which may be a temptation to act corruptly; but the sum or present must be proved to be so exorbitant, as to induce the court to believe that it biased their judgments; otherwise it will be of no effect. *Compl. Arb.* 76.

In the case of *Shepherd and Brand*, T. 7 G. 2. On a rule to shew cause why an award should not be set aside, one exception was, that before making the award, the arbitrators insisted upon three guineas apiece to be paid to them by each of the parties for their trouble and expences; that the defendant refused doing it on his part, upon which the plaintiff paid the whole money. The court said, that they thought it might be something dangerous, to suffer one side only to give money to arbitrators; and accordingly for that reason the rule was made absolute. 2 *Barnardist.* 463.

10. If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it; and the party who would take advantage of it, must shew that he has done what was requisite on his part: but if a thing is to be done generally, without mentioning time and place, it shall be done immediately. 2 *Brown.* 311.

11. If the submission is by rule of court, it is necessary that there be a personal demand of the thing awarded; and the party must make affidavit of such demand, before he can have an attachment. 1 *Salk.* 83.

12. If a sum of money be awarded to one of the parties, and that upon the payment thereof they both shall give mutual releases; if he who is to receive the money, refuses it, yet upon a tender and refusal, he is as much obliged to sign a release as if he actually received it. 1 *Salk.* 75.

A. Form of a submission by rule of court.

WHEREAS divers disputes and controversies have arisen, and are now depending, between A. B. of—— in the county of—— yeoman, of the one part, and C. D. of—— in the said county, yeoman, of the other part, touching and concerning—— Now for the ending and deciding thereof, it is hereby mutually agreed by and between the said parties, that all matters in difference between them for, touching, and concerning all and every the matters and things herein above specified and particularly mentioned, shall be referred and submitted to the arbitrament, final end, and determination of A. A. of—— in the said county, gentleman, B. A. of—— in the said county, yeoman, and C. A. of—— in the said county, yeoman, or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before the—— day of—— next ensuing the date hereof: And it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of his majesty's court of king's bench at Westminster. In witness whereof the said parties to these presents have hereunto set their hands this—— day of—— in the—— year, &c.

B. Arbitration bond.

KNOW all men by these presents, that I A. B. of—— in the county of—— gentleman, am held and firmly bound to C. D. of—— in the said county of—— yeoman, in—— pounds of good and lawful money of Great Britain, to be paid to the said C. D. or to his certain attorney, his executors, administrators, or assigns: To which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the—— day of—— in the—— year of the reign of our sovereign lord George the third, of Great Britain, France and Ireland, king, defender of the faith, and so forth, and in the year of our lord——.

Condition to stand to the award of two arbitrators,
in common form :

THE condition of the above obligation is such, that if the above bound A. B. his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe and keep the award, order, arbitrament, final end and determination of A. A. of———esquire, and B. A. of———gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the above-bound A. B. as of the above named C. D. to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the———day of———now next ensuing; [and if the said A. B. his heirs, executors, or administrators, or any of them, shall not prefer or cause to be preferred, any bill in equity against the said A. A. and B. A. or either of them, for or concerning their award in the premisses;] Then this obligation to be void, otherwise of force.

If the parties have a mind to make their submission a rule of court, then this may be added :

And the abovebound A. B. doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at Westminster, pursuant to the act of parliament in such case made and provided.

Condition to stand to the award of three arbitrators,
or any two of them, and an umpire appointed :

THE condition of this obligation is such, that if the above-bound A. B. his heirs, executors, and administrators, for and on his and their parts and behalfs, shall and do well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end and determination

tion of——or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the said A. B. as by and on the part and behalf of the above-named C. D. to arbitrate, award, order, judge and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties; so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the——day of——now next ensuing; then this obligation to be void, otherwise of force.

And if the said arbitrators shall not make such their award of and concerning the premises, within the time limited as aforesaid, then if the said A. B. his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil and keep the award, determination, and umpirage [if the umpire be named] of——being a person indifferently named and chosen between the said parties for umpire; [if not named] of such person as the said arbitrators shall indifferently chuse for umpire in and concerning the premises; so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the——day of——now next ensuing; and if the said A. B. his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in equity, against them the said arbitrators and umpire, or any of them, for or concerning the award of them the said arbitrators or umpire in the premises: Then this obligation to be void, otherwise of force.

[And the abovebound A. B. doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at Westminster, pursuant to the act of parliament in such case made.]

C. Form of an award.

TO all to whom these presents shall come, we A. B. of ——and C. D. of——do send greeting.

Whereas there are several accounts depending, and divers controversies have arisen, between——of——yeoman,
 I of

of the one part, and——of——yeoman, of the other part; And whereas, for the putting an end to the said differences, they the said——and——by their several bonds or obligations bearing date——last past, are reciprocally become bound each to the other, in the penal sum of——to stand to, abide, perform, and keep the award, order and final determination of us the said——so as the said award be made in writing and ready to be delivered to the parties in difference on or before——next ensuing, as by the said obligations and conditions thereof may appear: Now know ye, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following; that is to say, First, we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premisses, to the day of the date hereof, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges in any wise relating to, or concerning the premisses. And we do also award and order, that the said——shall deliver or cause to be delivered to the said——at——within the space of——&c. And further, we do hereby award and order, that the said——shall on or before——pay or cause to be paid unto the said——the sum of——We do also award and order, &c. And lastly, We do award and order, that the said——and——on payment of the said sum——shall in due form of law, execute each to the other of them, or to the other's use, general releases, sufficient in the law for the releasing by each to the other of them, his heirs, executors, and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premisses aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the——day of——last past (viz. the day of the date of the arbitration bonds). In witness whereof we have hereunto set our hands and seals the——day of——.

Form of an umpirage.

(**R**ECITE the arbitration bonds, as before) Now know ye, that I——umpire indifferently chosen by——having deliberately heard and understood the griefs and allegations and proofs of both the said parties, and willing

(as much as in me lieth) to set the said parties at unity and good accord, do by these presents arbitrate, award, order, decree, and judge as followeth; That is to say, &c.

Badgers.

(And herein of *Drovers of Cattle.*)

1. BY the 5 & 6 Ed. 6. c. 14. whatsoever person shall ingross or get into his hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell the same again, shall be deemed an unlawful ingrosser; and shall for the first offence (on conviction in the courts at *Westminster*, or at the sessions by inquisition, presentment, bill, or information, and on the oath of two witnesses) be imprisoned two months, and forfeit the value of the goods, cattle or victual, so by him bought or had; for the second offence, shall be imprisoned half a year, and forfeit double value; for the third offence, be set on the pillory, forfeit all his goods, and be imprisoned during the king's pleasure: one half of which forfeiture shall be to the king, and half to him that shall sue; and if the conviction shall be at the king's suit only, then the whole forfeiture shall be to the king.---Provided, that the buying of any corn, fish, butter, or cheese, by any such badger, lader, kidder, or carrier, as shall be allowed to that office by three justices of the county where the said badger, lader, kidder, or carrier shall dwell; which shall sell or deliver in open fair or market, or to any other victualler, or to any other person, for the provision of his house, all such corn, grain, butter and cheese, as any such person shall buy or cause to be bought, and that within one month next after he shall so buy any such corn, grain, butter or cheese, so that the same be bought without forestalling; shall not be deemed any offence contrary to this act. And provided that it shall be lawful to every person allowed by three justices of the county where he shall dwell, to buy (otherwise than by forestalling) corn, grain, or cattle, to be carried coastwise.

And by the same statute, if any person shall buy any oxen, ronts, fleers, kine, heifers, calves, sheep, lambs, goats, or kids living, and sell the same again alive, unless he keep and feed the same for five weeks in his own houses, ground, ferm-ground, or in such ground where he hath the herbage or common of pasture by grant or prescription; every such person so buying and selling again, shall forfeit double the value of the cattle or things so bought and sold again, to be recovered and applied as aforesaid. Provided, that it shall be lawful to every person, known for a common drover, being licenced in writing by three justices (1 Q.) of the county where the same drover shall be most abiding and dwelling, to buy cattle in any such counties where drovers have been wont in times past accustomedly to buy cattle at their free liberty and pleasure, and to sell the same (as is aforesaid) at reasonable prices, in common fairs and markets, distant from the place where he bought the same forty miles at the least; so that the same cattle be not bought by forestalling.

The same licences not to continue above one year, unless renewed.

2. But by the 5 *El. c. 12*. No drover of cattle, badger, lader, kidder, carrier, buyer, or transporter of corn or grain, butter and cheese, shall be licenced to those offices, but only in the general and open quarter sessions of the peace to be holden in the shire where such person dwelleth and hath dwelt for three years next before the teste of his licence; and only such person shall be licenced, who is or hath been a married man, and is at the time of granting the licence an householder, and not an household servant, nor retainer to any person, and of the age of 30 years at the least: which licences shall bear date of the day and place where the sessions was holden, and shall be signed and sealed with the proper hands and seals of three of the said justices (1 Q.) being present at the same sessions: on pain that every person, who shall take licence contrary to this ordinance, shall forfeit 5*l.* to be recovered and applied in manner as is aforesaid: and all licences otherwise granted shall be void. *f. 4, 5.*

And the justices in the said sessions shall take recognizance of such persons licenced, that they nor any of them shall by colour of their licence forestall or ingross, or otherwise practice or do any thing contrary to the tenor and true meaning, or in defrauding the said former statute, or of any matter or thing therein contained. *f. 6.*

Which said licences and recognizances shall be written by the clerk of the peace or his deputy, and by no other person.

person; who shall have for making out every such licence 12d. recognizance 8d. and for registering the said licence and recognizance 4d. at the most: for which he shall write all the names, surnames, and dwelling places of the persons licensed, with a brief declaration or entry of the licence, and of the day, time, and place where such licence was granted; which book he shall have at every sessions, to be there inspected. *id.*

Provided, that no person shall, by authority of any such licence, buy any corn or grain out of open fair or market to sell again, unless he shall be thereunto licensed, and have special and express words contained in his licence, that he may so do; on pain to forfeit for every time that he shall do to the contrary 5l. to be recovered and applied as aforesaid. *f. 7.*

And all licences shall continue for one year only from the date thereof. *f. 4.*

Provided, that nothing herein contained shall prejudice the liberty of any city or town corporate, but that they may license purveyors for the provision thereof, as they might have done before. *f. 9.*

Provided also, that nothing herein contained shall be in any wise hurtful or prejudicial to any of the inhabitants within the counties of *Westmorland, Cumberland, Lancaster, Chester, and York*; but that they may do, as heretofore they have lawfully used to do. *f. 10.*

3. But by the 13 *El. c. 25.* No person shall be a buyer, badger, kidder or carrier of corn, cattle, butter, cheese, and such like kind of victual, in none other manner nor form, than is contained in the statute of 5 *El.* nor shall be any other ways admitted or licensed to be a buyer, badger, kidder, or carrier, as is aforesaid, than is mentioned and appointed by the said statute; any thing in this, or any other act heretofore to the contrary notwithstanding. *f. 20.*

What was mentioned in this act to the contrary before, was only the revival and perpetuating of the statute of the 5 & 6 *Ed. 6. c. 14.* which being temporary, had then expired. And this seemeth to conduct us to the true meaning of this clause in the statute of 13 *El.* and consequently to settle a point much controverted; namely, what obligation lies upon drovers and badgers in the said five northern counties to be licensed according to the aforesaid statute of the 5 *El. c. 12.* And the opinion seemeth at last to have prevailed, that by virtue of this clause, they are brought under the same regulations of the statute of 5 *Eliz. c. 12.* concerning licences, with the inhabitants of the
other

other counties; from which, before, by the exception in the said statute they had been exempted. But the observation above-mentioned will perhaps lead us to a different construction, which is this: The statute of 5 & 6 *Ed. 6. c. 14.* directing persons to be licensed by three justices generally (without the formalities required afterwards by the 5 *Eliz. c. 12.*) was, as appears upon the face of it, temporary; and after several continuances, did expire in the 8th year of queen *Elizabeth*. Which act being expired, the sole business of licensing then rested upon the statute of 5 *Eliz.* out of which the inhabitants of the said northern counties were excepted, and consequently were then under no obligation to take any licences at all. Now the statute of the 13th *Eliz.* reviving the said statute of 5 & 6 *Ed. 6.* brought the same as it were over the head of the statute of the 5 *Eliz.* and consequently being now become in its course subsequent to the statute of the 5 *Eliz.* it would have altered the said statute of 5 *Eliz.* in matters wherein they are contrary; and therefore to restore the statute of the 5 *Eliz.* to its authority and influence (after the revival or continuance of about 15 other acts of parliament, and divers other matters there treated of) a clause is put in at the end, referring to the act of 5 & 6 *Ed. 6. c. 14.* which at the beginning had been revived and perpetuated; namely, that notwithstanding such revival, no person shall be licensed otherwise than by the statute of the 5 *Eliz.* so that the case stands, as if the statute of 5 & 6 *Ed. 6.* had been perpetual from the beginning, and as if the statute of 13 *Eliz.* had not been made; and consequently upon the two statutes of 5 & 6 *Ed. 6. c. 14.* and 5 *Eliz. c. 12.* the inhabitants of the said northern counties are not to be licensed according to the said statute of 5 *Eliz. c. 12.* (for they are excepted out of it); but they are *to do as before they had* “lawfully” *used to do*, that is to say, they are to be licensed according to the statute of 5 & 6 *Ed. 6. c. 14.* namely, badgers, laders, kidders, carriers, and transporters coastwise, by three justices, generally, out of sessions; and drovers, by three justices, one whereof is to be of the quorum; and without the formalities of age, marriage, three years inhabitancy, being householders, and the rest, as is required of others by the 5 *Eliz.*

But there is another great doubt, whether persons who buy corn, and make the corn into meal, and then sell the meal, are persons by these acts required to be licensed. Arguments for the negative, are; that the statute of *Ed. 6.* only requires persons to be licensed, who buy corn and

sell the same again, that is, sell the corn (as it seemeth), and not the corn manufactured. And if the statute meant otherwise, then bakers who buy meal, and convert the same into bread, and sell the bread, would be ingrossers; and so in all other kinds of manufacture of dead victuals. And that the statute did not intend to include such manufacturers of corn, altho' unlicensed, under the denomination of ingrossers, seemeth to be implied, in that the licence it self can only impower them to sell the corn again within one month after it was bought; which, in the case of making corn into malt in particular, is not applicable, forasmuch as a longer time than this is required in the operation.

Licence of a badger on the 5 & 6 Ed. 6. c. 14.
and 5 El. c. 12.

Middlesex. **A**T the general quarter sessions of the peace held at———in and for the said county, this———day of———in the———year of——— We A. B. C. D. and E. F. esquires, justices of the peace for the said county (one whereof is of the Quorum) have licensed, and by these presents do license and admit B. B. of———in the said county, being upwards of thirty years of age, and being also a married man [or, a widower], and an householder, and having been an inhabitant in the said county for three years now last past, to be a badger, lader, kidder, carrier, and buyer, of corn and grain [butter and cheese, or as the case shall be], for the space of one whole year from the date hereof, to buy corn and grain [butter and cheese] in open fair or market, and without forestalling; and to sell or deliver the same again in open fair or market, or to any victualler or other person for the provision of his house, within one month after he shall have so bought the same; so as he practise the said business according to the true intent and meaning of the statute made against regrators, forestallers, and ingrossers, and not otherwise. Given under our hands and seals the day and year aforesaid.

If it is for carrying coastwise, then it may run thus :

———to be a transporter of corn and grain, for the space of one whole year from the date hereof, to buy corn and grain, otherwise than by forestalling; and to transport and carry the same by water from any port or place within the kingdom of England and Wales, unto any other port or place within the same; so as he do without fraud or covin ship or embark the said corn or grain within forty days next after he shall have
bought

bought the same, or taken covenant or promise for the buying thereof; and with such expedition and diligence as wind and weather will permit, do carry and transport the same do such port or place as his cocket shall declare; and there to disembark, unlade and sell the same; and do bring a true certificate thereof from a justice of the peace of the county, or the mayor or bailiff of the town corporate where the same shall be unladen, and also of the customer of the port where such unloading shall be, of the place and day where the said corn or grain shall be disembarked, unladen and sold, to be directed to the customer and comptroller of the port where the same were embarked; and so as he practise the said business according to the true intent and meaning of the statute made against regraters, forestallers, and ingrossers, and not otherwise. Given, &c.

Licence of a Drover, on the said statutes.

——to be a common drover of cattle, to buy cattle in any such shires or counties where drovers have been wont accustomed to buy cattle, at his free liberty and pleasure, so as the same be not bought by way of forestalling; and to sell the same again in common fairs and markets, distant from the place where he shall buy the same respectively forty miles at the least; so as he practise the said business according to the true intent and meaning of the statute made against regraters, forestallers, and ingrossers, and not otherwise. Given, &c.

Condition of the recognizance.

WHEREAS the abovebound A. D. is this day by us licensed to be a common drover of cattle [badger, lader, kiddier, carrier, buyer, transporter of corn and grain, butter and cheese, or as the case is] for the space of one whole year now next ensuing; The condition of this recognizance is such, that if the above bound A. D. shall not by colour of his said licence forestal or ingross, or otherwise practise or do any act or thing contrary to the tenor and true meaning, or in defrauding of the statute made against regraters, forestallers, and ingrossers, or of any matter or thing therein contained; then this recognizance to be void, otherwise of force.

Badger's licence in the five northern counties, on the 5 & 6 Ed. 6. c. 14.

Westmorland. { **W**E three of his majesty's justices of the peace for the said county, do hereby license and allow A. B. of——in the said county, to be a
K 2 badger,

Badgers.

badger, lader, kiddler, carrier, and buyer of corn and grain [butter and cheese, or as the case shall be], for the space of one whole year from the date hereof, to buy corn and grain [butter and cheese] in open fair or market, and without forestalling; and to sell or deliver the same again in open fair or market, or to any victualler or other person for the provision of his house, within one month after he shall have so bought the same; so as he practise the said business according to the true intent and meaning of the statute made against regraters, forestallers, and ingrossers, and not otherwise. Given under our hands and seals, the——day of——in the year——

Drover's licence in the five northern counties, on the 5 & 6 Ed. 6. c. 14.

Westmorland. { **W**E thre of his majesty's justices of the peace for the said county (one whereof is of the quorum) do hereby license and allow A. D. of —— in the said county, to be a common drover of cattle, to buy cattle in any such shires and counties [and so on as in the drover's licence above.] Given under our hands and seals, the ——day of——in the year——

And for these northern counties no recognizance is required; but they are otherwise punishable, if they exceed their licence, by the said statute of 5 & 6 Ed. 6. c. 14.

A special licence to buy corn out of fairs or markets, may be the same as the badgers general licences above; only instead of the words [to buy corn and grain, in open fair or market] may be inserted these words [to buy corn and grain in and also out of open fair or market]; with such other words of restriction or limitation of such licence, as shall be judged requisite.

Bail.

- I. What it is.
- II. Difference between bail and mainprize.
- III. When a person may be discharged without bail.
- IV. Who may or may not be bailed.
- V. Who may bail, and the manner of it.
- VI. Requiring excessive bail.

VII. Denying

VII. Denying bail where it ought to be granted.

VIII. granting bail where it ought to be denied.

IX. Of bail by writ of habeas corpus.

X. Acknowledging bail in another man's name.

I. What it is.

BAIL (from the french *bailler*, to deliver) signifies the delivery of a man out of custody, upon the undertaking of one or more persons for him, that he shall appear at a day limited, to answer and be justified by the law. *Hale's Pl. 96.*

II. Difference between bail and mainprise.

The difference between bail and mainprise is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him, and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. *Hale's Pl. 96.*

III. Where a person may be discharged without bail.

If a person be brought before a justice, if it appears that no felony is committed, he may discharge him; but if a felony be committed, tho' it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him. *Hale's Pl. 98.*

IV. Who may or may not be bailed.

At the common law, bail was allowed in all cases but homicide; but now the statute of the 3 *Ed. 1. c. 15.* directeth what offenders shall be bailed, and what not. *Hale's Pl. 97.*

It is true the said statute only prescribeth who shall or shall not be let to bail by the sheriff; but by the 1 & 2 *P. & M. c. 13.* it is enacted that no justice or justices of the peace shall let to bail or mainprise any person not replevisable by the said statute of 3 *Ed. 1. c. 15.*

Which statute is as follows: *Forasmuch as sheriffs and others, which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were reple-*

visable, because they would gain of the one party and grieve the other; and forasmuch as before this time it was not determined which persons were replevisable, and which not, but only those that were taken for the death of a man, or by commandment of the king, or his justices, or for the forest: It is provided, that such prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manner, and those which have broken the king's prison, thieves openly defamed and known, and such as be appealed by provors, so long as the provors be living, (if they be not of good name,) and such as be taken for houseburning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise replevisable by the common writ, nor without writ. But such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or for petit larceny, that amounteth not above the value of 12d. if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment or force, or of aid in felony done, or guilty of some other trespass for which one ought not to lose life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief nor defamed), shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods.

Sheriffs and others] That is to say, sheriffs and gaolers that have custody of gaols; so that this act extends not to any of the king's justices or judges of any superior courts of justice. 2 Inst. 185. But by a subsequent statute (as hath been said) it is extended to justices of the peace.

But only those, &c.] Here are first set down four sorts of persons which before this act were not bailable by the common writ *de homine replegiando*:

1. Those that were taken for the death of a man] By the ancient law of the land, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed to prison; but afterwards it was provided by parliament, that in case of homicide the offender was not bailable. 2 Inst. 186.

And even if a person hath dangerously wounded another, the justice ought to be very cautious how he takes bail, till the year and day be past; for if the party die, and the offender appear not, he is in danger of being severely fined. 1 Haw. 138.

And

And this statute makes no distinction between such homicide as is malicious, and that which happens by misadventure or in self defence: and it seems agreed, that justices of the peace, who have power at this day to bail a man arrested for a *light suspicion* of homicide, cannot bail any such person for manslaughter, or even excusable homicide, if it manifestly appear that he was guilty of the fact, let it be ever so plain that it cannot amount to murder. 2 *Haw.* 95, 105.

2. *Or by commandment of the king*] That is, by matter of record in one of his courts, according to law; and not an extrajudicial commandment. 2 *Inst.* 186, 187. So also it is provided in the petition of rights 3 *Car.* that no person shall be detained in prison by the king's special command, without cause certified.

And because some courts, as the king's bench, are before the king, and some before his justices, therefore the act saith, *by commandment of the king*, and the next words be, *or of his justices*. 2 *Inst.* 186.

3. *Or of his justices*] That is, of any of the courts of *Westminster*, or justices of assize. 2 *Haw.* 96.

4. *Or for the forest*] But as to imprisonment for offences in forests, the law hath been much mitigated by later statutes. 2 *Haw.* 98.

All these four are excepted out of the common writ *de homine replegiando*, that the sheriff in his county court, which is not a court of record, shall not replevy any of these four that are committed, altho' it should be by an unlawful commitment; but the superior courts at *Westminster*, upon an *habeas corpus*, shall do justice to the party in all these four cases. 2 *Inst.* 187.

Next the act doth further provide, that these kinds of prisoners hereafter following (being 13 in number) shall not be replevifable:

1. *Such prisoners as before were outlawed*] Persons outlawed are *attainted* in law, and therefore are not bailable; for the intendment of the law is, that the person standeth indifferent whether he be guilty or no; and not if he be convicted or attainted. 2 *Inst.* 188.

2. *And they which have abjured the realm*] For these also are attainted upon their own confession, and therefore not bailable at all by law. 2 *Inst.* 188.

3. *Provors*] A provor, or *approver*, is a person that confesseth the felony with which he is charged, and under-

takes to *prove* another guilty of the same crime ; which if he does, he saves his own life, otherwise he shall be immediately executed. And the reason why they are not bailable is, because they are guilty by their own confession, and therefore they do not stand indifferent. 2 *Inst.* 188.

But this concerns not justices of the peace, because no man can become an approver before them, for that they cannot assign a coroner. *Hale's Pl.* 102.

4. *And such as be taken with the manner*] For in this case likewise, he standeth not indifferent whether he be guilty or no, being taken with the *mainer*, that is, with the thing stolen as it were in his *band*, anciently called *bandhabbend*, and the like was anciently called *backberend*, as a bundle or fardle at his *back* ; which was used to signify manifest theft. 2 *Inst.* 188.

5. *And those which have broken the king's prison*] Here are two offences ; first his breaking of the prison, for it is presumed that he who is innocent will never break prison : and secondly, his flying, because he confesseth the fact who flies from judgment. 2 *Inst.* 188.

6. *Thieves openly defamed and known*] Who, as it seems, ought not to be bailed for any fresh felony, whereof there is probable evidence against them. But this seems in a great measure to be left to the discretion of the person who has power to bail them, who on consideration of the circumstances of the whole matter, and the probabilities on both sides, if he finds it reasonable strongly to presume them to be guilty, ought not to bail but commit them. 2 *Haw.* 99.

7. *Such as be appealed by provors, so long as the provors be living, if they be not of good name*] The appeal of the approver is forcible against the appellee, because the approver confesseth himself guilty of the same felony, and therefore it serveth in nature of an indictment against the appellee, so long as the approver liveth, unless the appellee be of good fame. 2 *Inst.* 188.

8. *And such as be taken for houseburning feloniously done*] This was felony by the common law. 2 *Inst.* 188.

9. *Or for false money*] This was treason by the common law. 2 *Inst.* 188.

10. *Or for counterfeiting the king's seal*] This was also treason by the common law. 2 *Inst.* 188.

11. *Or persons excommunicate, taken at the request of the bishop*] That is, he that is certified into the chancery by the bishop to be excommunicated, and after is taken by force of the king's writ of *excommunicato capiendo*, is not bailable: For in ancient times men were excommunicated but for heresies, or other heinous causes of ecclesiastical cognizance, and not for small or petty causes; and therefore in those cases the party was not bailable by the sheriff or gaoler without the king's writ; but if the party offered sufficient caution *de parendo mandatis ecclesie in forma juris*, then should the party have the king's writ to the bishop to accept his caution, and to cause him to be delivered: And if the bishop will not send to the sheriff to deliver him, then shall he have a writ out of the chancery to the sheriff for his delivery: Or if he be excommunicated for a temporal cause, or for a matter whereof the ecclesiastical court hath no cognizance, he shall be delivered by the king's writ without any satisfaction. 2 *Inst.* 189.

12. *For manifest offences*] Which seems to be understood of inferior crimes of an enormous nature under the degree of felony; as dangerous riots, exorbitant rescoues, misprison of treason, præmunire, and such like heinous offences. Yet it seems to be in a great measure left to discretion, to judge in what cases their crime is so flagrant and enormous, that they ought not to have the benefit of it. 2 *Haw.* 99.

13. *Or for treason touching the king himself*] By the common law, a man accused or indicted of high treason, or of any felony whatsoever, was bailable upon good surety, until he were convicted; for at common law, the gaol was his pledge or surety, that could find none. 2 *Inst.* 189.

Shall be in no wise replevisable by the common writ, nor without writ] That is, the sheriff shall not replevy them by the common writ *de homine replegiando*, nor without writ, that is, *ex officio*: But all or any of these may be bailed in the king's bench. 2 *Inst.* 189.

Next the act setteth down seven kinds of offenders that may be bailed:

1. *Such as be indicted of larceny by inquests taken before sheriffs or bailiffs*] That is, before sheriffs in their towns, or lords in their leets, or those that have *infangthief* and *outfangthief*; that is, who have the privilege to judge thieves taken *within* their fee, or thieves dwelling within their

their manor and taken for felony out of their fee. Yet this is expounded that they be of good fame. 2 *Inst.* 190.

2. *Or of light suspicion*] But if the presumption be strong, or the defamation great, the justices may refuse to bail him, *Hale's Pl.* 102. And this is expounded also that they be of good fame. 2 *Inst.* 190.

3. *Or for petit larceny that amounteth not above the value of 12d. if they were not guilty of some other larceny aforetime*] This act divideth larceny into two kinds; grand larceny, when the thing stolen is above the value of 12d. and petit larceny, when it is of the value of 12d. or under. 2 *Inst.* 189.

And it seems to be agreed, that there is no necessity that such persons be of good fame; yet upon the construction of the whole statute, if such persons be taken with the manner, or confess the fact, or their crime be otherwise open and manifest, it seems that they ought not to be bailed; but if there be any colour of probability for their innocence, it seems most agreeable to the intention of the statute to bail them. 2 *Hawk.* 101.

4. *Or guilty of receipt of felons*] These are accessaries after the fact. 2 *H. H.* 100.

5. *Or of commandment, or force, or of aid in felony done*] These are accessaries before the fact. 2 *H. H.* 100.

But accessaries to felonies are not to be bailed, unless they be of good reputation: And it seems at this day to be settled, that where there are strong presumptions of guilt, such accessaries are not bailable by this statute. 2 *Haw.* 102.

6. *Or guilty of some other trespass, for which one ought not to lose life nor member*] But it seems reasonable to qualify the generality of this expression, with this limitation, that such accusation ought to be either on a light suspicion, or else that the offence be inconsiderable, or that it be not excluded from bail by some special act of parliament. 2 *Haw.* 99. 2 *H. H.* 135.

7. *And a man appealed by a provor, after the death of the provor, if he be no common thief, nor defamed*] And by parity of reason, he may be bailed, if the approver waive his appeal, or be vanquished. 2 *Haw.* 98.

Be let out by sufficient surety] If a justice take insufficient surety, and the party appear not, he is finable by the judge

judge of affize. *H. P.* 97. But if the prisoner appear thereupon, the justice is safe. 2 *Haw.* 89.

And if a person who has power to take bail, be so far imposed upon, as to suffer a prisoner to be bailed by insufficient persons, it is said that either he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal, for that insufficient sureties are no sureties. 2 *Haw.* 89.

And the person who is to take the bail, may examine them on their oaths concerning their sufficiency. 2 *Haw.* 89. 2 *H. H.* 125.

It is to be observed, that the abovesaid statute extends only to bail in criminal offences, and therefore gives no power at all to justices of the peace to bail any persons on process in civil actions, or for contempts to superior courts. 2 *Haw.* 106.

There are furthermore many statutes, which prohibit bail and mainprise in very many cases, and allow the same in many others, which are interspersed among the several titles which treat of those matters.

And where a statute ordaineth, that an offender shall be imprisoned at the king's will or pleasure, there the prisoner cannot be bailed, till he hath redeemed his liberty by such fine or ransom as shall be assessed by the king's justices in his courts. *Dalt. c.* 167.

Altho' a person be committed to be detained without bail or mainprise, yet if the offence be by law bailable, he that hath power of bailing may bail him. 2 *H. H.* 135.

V. Who may bail, and the manner of it.

By the common law, the sheriff and every constable, being conservators of the peace, might have bailed one suspected of felony; but this authority is transferred from them to the justices of the peace by several statutes. *Lamb.* 15.

And it seems to be a good general rule, that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime: And upon this ground it seems clear, that any two justices (1 *Q.*) may of common right bail persons indicted at the sessions, for that any two such justices may hear and determine the indictment. Also it hath been holden, that any one justice hath the like power; and this

this seems to be implied by the statute of 1 R. 3. c. 3. which giving one justice power of bailing persons arrested for felony, *in like form as if such persons had been indicted at the sessions*, clearly supposes, that if such persons had been indicted at the sessions, they might have been bailed by any one justice. And if any one justice had such power, before the statute specially relating to the power of justices in granting bail, it seems that he hath still the same power in relation to persons so indicted of any bailable crime under the degree of *felony*, because the said statutes seem not to restrain him in any such case, under the degree of felony, from any power which he lawfully might claim before. 2 Haw. 103.

But it seems difficult to maintain the power of one justice to bail a person, for any crime *before* indictment, unless by some statute it be limited to the consuance of one justice, or unless it be an offence directly tending to the breach of the peace, the bailing of persons for which seems properly to come under their consuance as conservators of the peace. 2 Haw. 105.

And Mr. Dalton says, if it is not in case of felony, it seemeth that any one justice alone may bail a prisoner, except where it is otherwise ordered in particular instances by some special statute. *Dalt. c. 12.*

And it seems to be agreed, that any one justice might always in his discretion either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstances that the party is most likely to live or die; for that every such justice being a principal conservator of the peace, the offence at present being only an enormous breach thereof, and no felony, seems properly to come under his consuance. 2 Haw. 103.

But by 1 & 2 P. & M. c. 13. *If a person be arrested for manslaughter, or felony, or suspicion thereof, being bailable by law, he shall not be let to bail or mainprise by any justices, but in open sessions, except it be by two justices at the least (1 Q.) and the same to be present together at the time of the said bailment: Which bail they shall certify in writing subscribed or signed with their own hands, at the next general gaol delivery to be holden within the county where the person shall be arrested or suspected.*

And the said justices, or one of them, being of the quorum, when any such prisoner is brought before them, for any manslaughter or felony, before any bailment, shall take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same or as much

much thereof as shall be material to prove the felony, shall put in writing before they make the bailment: Which examination together with the bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission.

And the said justices shall have power to bind all such by recognizance as do declare any thing material to prove the offence, to appear at the next general gaol delivery to give evidence against the party on his trial: And shall certify the same in like manner.

And any justice offending contrary to this act, shall on due proof by examination, be fined by the judges of assize.

But in London, Middlesex, and in other cities and towns corporate, justices may let prisoners to bail, as they might before this act; but when they do bail, they are to take and certify the bail and examination as is here directed.

VI. Requiring excessive bail.

By the declaration of rights 1 *W. sess. 2. c. 2.* Excessive bail ought not to be required.

VII. Denying bail where it ought to be granted.

To refuse bail where the party ought to be bailed (the party offering the same) is a misdemeanor punishable not only by the suit of the party, but also by indictment. 2 *Haw. 90. H. P. 97.*

VIII. Granting bail where it ought to be denied.

Admitting bail where it ought not, is punishable by the judges of assize by fine; or punishable as a negligent escape at common law. *H. P. 97.*

If the keeper of a prison bail any not bailable, he shall lose his fee and office; if another officer, he shall have three years imprisonment, and make fine at the king's pleasure. 3 *Ed. 1. c. 15.*

M. 18 G. 2. K. and William Clarke, esquire. He as a justice of Surrey committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill, but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves. *Sir. 1216.*

IX. Of bail by writ of habeas corpus.

If bail cannot otherwise be obtained, the law hath provided a remedy in most cases by the *habeas corpus* act 31 C. 2. c. 2. The substance of which is briefly thus :

If the commitment is for treason or felony, plainly and specially expressed in the warrant of commitment ; also if any person is committed and charged as accessory before the fact to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment : in such cases the person shall not be bailed on a writ of habeas corpus ; otherwise he may be bailed.

Also if a person is committed for treason or felony specially expressed, yet if he shall in open court the first week of the term, or first day of assize, petition to be tried, and shall not be indicted some time in the next term or assize after the commitment, he shall upon motion the last day of the term or assize, be bailed, unless it shall appear to the judge upon oath that the king's witnesses could not be produced within that time, and then if he is not tried in the second term or assize, he shall be discharged.

Previous to the aforesaid bailment, the prisoner or some person on his behalf, shall demand of the officer or keeper, a true copy of the warrant of commitment, which he shall deliver in six hours, on pain of 100l. to the party grieved for the first offence, and 200l. and forfeiture of his office for the second.

Then application is to be made in writing, by the prisoner or any person for him, attested and subscribed by two witnesses who were present at the delivery thereof, to the court of chancery, king's bench, common pleas, or exchequer, or if out of term time, to the lord chancellor or one of the judges ; and a copy of the warrant of commitment shall be produced before them, or oath made that such copy was denied.

But if any person hath wilfully neglected by the space of two terms to apply for his enlargement, he shall not have a habeas corpus granted in the vacation.

This being done, the lord chancellor, or judges respectively, shall award an habeas corpus under the seal of the court, on pain of 500l. to be marked in this manner, Per statutum tricesimo primo Caroli secundi regis, and signed by the person that awards the same ; and shall be directed to the officer or keeper, returnable immediate.

And the charges of bringing the prisoner shall be ascertained by the judge or court that awarded the writ, and indorsed thereon, not exceeding 12d. a mile.

Then

Then the writ shall be served on the keeper, or left at the gaol with any of the under-officers; and the charges so indorsed, shall be paid or tendered to him, and the prisoner shall give bond to pay the charges of carrying him back if he shall be remanded, and that he will not make any escape by the way.

This done, the officer shall within three days after service (if it is within twenty miles) return the writ, and bring the body, and shall then likewise certify the true cause of the imprisonment; if above twenty miles and less than an hundred, then within ten days; if above an hundred, then within twenty days; on like pain as before.

But after the assizes are proclaimed for the county where the prisoner is detained, he shall not be removed.

Then if it shall appear to the said lord chancellor or judges, that the prisoner is detained on a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters, or by warrant of a judge or justice of the peace for matters for the which by law he is not bailable; in such case the prisoner shall not be discharged.

If he shall be discharged, he shall thereupon enter into recognizance to appear on his trial; and the writ, and return thereof, and recognizance shall be certified into the court where the trial must be.

But persons charged in debt, or other action, or with process in any civil cause, after their discharge for a criminal offence, shall be kept in custody for such other suit.

*And persons so set at large, shall not be recommitted for the same offence, unless by order of court; on pain of 500*l.* to the party grieved.*

Two things I shall observe upon this statute:

1. That altho' the constable by his own authority, without any warrant of commitment, may carry offenders to gaol, and this was the method of securing prisoners, before that there were any justices of the peace; yet since the institution of the office of justices of the peace, it is better that they be carried before a justice, to be sent by him to gaol by warrant of commitment; otherwise they have a right to be bailed upon this act, whatever the offence may be.

2. That the warrant of commitment ought to set forth the cause specially; that is to say, not for treason or felony in general, but treason *for counterfeiting the king's coin*, or felony *for stealing the goods of such a one to such a value*, and the like; that so the court may judge thereupon, whether or no the offence is such, for which a prisoner ought to be admitted to bail.

X. A. A.

X. *Acknowledging bail in another man's name.*

By the 21 J. c. 26. *If any person shall acknowledge, or procure to be acknowledged, any bail in the name of any other not privy to the same; he shall be guilty of felony without benefit of clergy.*

In the name of any other] T. 6 G. Two people put in bail in feigned names, and because there were no such persons, they could not be prosecuted for personating bail on this statute. So the court ordered them and the attorney to be set in the pillory, which was done accordingly. Str. 384.

Bail taken before a judge is not within this statute, till it be filed of record. 1 H. H. 696. But it is within the following statute of 4 W. c. 4. by which it is enacted, that any who shall personate another before those who have authority to take bail, so as to make him liable to the payment of any sum of money in that suit or action, shall be guilty of felony (but within clergy).

Form of bail.

Westmorland. **B**E it remembred, that on the——day of —— in the——year of the reign of——A. O. of——yeoman, A. B. of——yeoman, and B. B. of——yeoman, came before us John Moore, esquire, and Richard Burn, clerk, two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, and severally acknowledged themselves to owe to our said lord the king, that is to say, the said A. O. 20l. and the said A. B. and B. B. 10l. each, to be respectively levied of their lands and tenements, goods and chattels, if the said A. O. shall make default in the performance of the condition indorsed, [or underwritten].

John Moore,
Richard Burne.

The condition of this Recognizance is such, that if the within [above] bound A. O. shall personally appear before the justices of our sovereign lord the king assigned to keep the peace within the said county, and likewise to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter sessions of the peace [or, before his majesty's justices of gaol delivery, at the next general gaol delivery] to be holden in

in and for the said county, then and there to answer to our said sovereign lord the king, for and concerning the felonious taking and stealing of——the property of A. M. of——yeoman, with the suspicion whereof the said A. O. stands charged before us the said justices, and to do and receive what shall by the court be then and there enjoined him, and shall not depart the court without licence, then the above [within] written recognizance shall be void.

Or, if the party is in prison, and so absent, Lord Hale says, this is the true form from *Lambard*.

Westmorland. **B**E it remembered, that on the——day of——in the——year of the reign of——before us John Moore, esquire, and Richard Burn, clerk, two of the justices of our said lord the king, assigned to keep the peace within the said county, and one of us of the quorum, at Grimeshill in the said county, did come A. B. and B. B. of——in the said county, yeomen, and took in bail until the next gaol delivery to be holden in the said county, one A. O. of——labourer, taken and detained in prison for suspicion of a certain felony in stealing——the property of——and took upon themselves each of the said A. B. and B. B. under the penalty of 20l. of good and lawful money of Great Britain, of the goods and chattels, lands and tenements, of them and each of them, to the use of our said lord the king, his heirs and successors, to be levied, if the said A. O. shall not personally appear at the said next gaol delivery, before the justices of our said lord the king, assigned to deliver the said gaol, to stand to right concerning the felony aforesaid, according to the law and custom of England. Given under our seals, &c.

But the seal need not be, for they are judges of record; only it may be barely subscribed by them: or thus,

Taken and acknowledged the day and year aboveswritten, before us the abovesaid

John Moore,
Ri. Burn.

And hereupon a warrant issues for his deliverance, thus :

Westmorland. **J**OH^N Moore, *esquire*, and Richard Burn, *clerk*, two of the justices of——— and one of us of the quorum, To the keeper of his majesty's gaol at —— in the said county, greeting. Forasmuch as A. O. —— labourer, hath before us found sufficient sureties to appear before the justices of gaol delivery at the next general gaol delivery to be holden in the said county, to answer to such things as shall be then on the behalf of our said sovereign lord objected against him, and namely, to the felonious taking of —— (for the suspicion whereof he was taken, and committed to your said gaol) ; We command you on the behalf of our said sovereign lord, that if the said A. O. do remain in your said gaol for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under our seals at Orton in the said county, the —— day of —— in the —— year ——.

Lord Hale says, the advantage of this latter kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause ; and may reseize him if they doubt his escape, and have him committed, and so be discharged of the recognizance.

Bailiff. See Sheriff.

Baker. See Byard.

Banks destroying.

Powdike,

I. EVERY perverse and malicious cutting down and breaking up of any part of the dike called new *Powdike* in *Marshland* in the county of *Norfolk*, and the broken dike called *Old field dike* by *Marshland* in the isle of *Ely*, or of any other bank being parcel of the rind and uppermost part of the said county of *Marshland*, made for the defence and salvation of the said country of *Marshland*, shall be adjudged felony. And the sessions may determine the same. 22 H. 8. c. 11.

2. By

2. By the 6 G. 2. c. 37. If any person shall unlawfully ^{Sea and river} and maliciously break down or cut down the bank of any ^{banks.} river or any sea bank, whereby any lands shall be overflowed or damaged; he shall be guilty of felony without benefit of clergy. *f. 5.*

And the hundred shall make satisfaction for the damages, not exceeding 200*l.* as may be seen more at large under the title **Black Act.**

3. And moreover, by the statute of 10 G. 2. c. 32 ^{Piles for securing} If any person shall unlawfully cut off, draw up, or re- ^{banks.} move and carry away any piles, chalk or other materials, driven into the ground, and used for the securing any marsh or sea walls, or banks, in order to prevent the lands lying within the same from being overflowed and damaged; on complaint or information thereof made upon oath to any justice residing near the place, such justice shall summon the party complained of, or shall issue his warrant to apprehend and bring such person before him; and upon his appearance, or neglect to appear, he shall proceed to examine the fact, and upon due proof thereof made either by confession, or oath of one witness, shall convict the offender; who shall thereupon forfeit 20*l.* half to the informer, and half to the overseer for the use of the poor, to be levied by distress and sale: for want of sufficient distress, to be committed to the house of correction, to be kept to hard labour for six months. *f. 5.*

Bankrupt.

1. **L**ORD Coke says, that *banque* in *French* signifies the ^{Derivation.} same as *mensa* in *Latin*; and that *route* is a sign or mark, as we say a cart rout is the sign or mark where the cart hath gone; and that metaphorically a *bankrupt*, or *banqueroute*, is taken for him, that hath wasted his estate, and removed his *banque* so as there is left but a mention thereof. 4. *Lift.* 277.

But as the first bankers to us came from *Italy*, it seemeth more probable that they brought their name along with them; and consequently that the word *bankrupt* or *banqueroute* cometh from the Italian *banco rotto*, the *bench* being broken. The *banler* himself was so called from the *bench* or table which he used, with his name inscribed, and when he failed, his bench was broken. Which word

rotto is what remaineth in that country of the latin *ruptus*; all which, both word and metaphor, we preserve in our language, when we say that a person is *bankrupt*, or that such a one is broken.

Description of a bankrupt.

2. The description of a bankrupt, within the several statutes brought together into one view, seemeth to be as follows: *Every person using the trade of merchandize, by way of bargaining, exchange, bartry chevifance, or otherwise, in gross, or by retail, or seeking his trade of living by buying and selling, or that shall use the trade or profession of a scrivener receiving other mens monies or estates into his trust or custody, who shall (1) depart the realm; or (2) begin to keep his house, or otherwise to absent himself; or (3) take sanctuary; or (4) suffer himself willingly to be arrested for any debt or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause or good consideration or purposes; or (5) shall suffer himself to be outlawed; or (6) yield himself to prison; or (7) willingly or fraudulently shall procure himself to be arrested, or his goods to be attached or sequestred; or (8) depart from his dwelling house; or (9) make any fraudulent grant or conveyance of his lands or goods, to the intent or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts; or (10) shall obtain any protection, other than such person as shall be lawfully protected by privilege of parliament; or (11) shall prefer to any court any petition or bill against any of his creditors, thereby endeavouring to force them to accept less than their just debts, or to procure time, or longer days of payment than was given at the time of their original contracts; or (12) being arrested for debt, shall lie in prison twelve months; or (13) being arrested for 100l. or more, shall escape out of prison,—shall be adjudged a bankrupt; (and in the said cases of arrest, or lying in prison, from the time of his first arrest.)* 1 J. c. 15. s. 2. 21 J. c. 19. s. 2, 15. 10 An. c. 15. s. 1.

Every person] With respect to persons having privilege of parliament, it is enacted by the 4 G. 2. c. 33. that the petitioners, on affidavit in any of his majesty's courts of record at Westminster, that the debt is justly due, and that they verily believe that the debtor is a merchant, banker, broker, factor, scrivener, or trader, within the statutes of bankruptcy, may sue out a summons, or an original bill and summons, against such person, and serve him with a copy thereof; and if he shall not, within two months after personal service of such summons, pay, secure, or compound for such debt, or enter into bond in such sum and with two such sureties as any of the judges

of that court out of which the summons issued shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, he shall be adjudged a bankrupt from the time of the service of such summons, and the creditors may proceed against him as against other bankrupts. Provided, that this shall not extend to any debt contracted before March the 8th, 1764. And provided also, that nothing herein shall subject any person intitled to privilege of parliament to be arrested or imprisoned during the time of such privilege, except in cases made felony by any of the statutes of bankruptcy.

So a *clergyman*, if he trades, may be a bankrupt; for tho' by the 21 H. 8. c. 13. he is prohibited to trade, and his contracts in that kind are declared to be void, yet they are void with respect to himself only, and he shall not take advantage of the breach of one law, in order to avoid his being subject to another. *Tracy Atkins*. 199.

The daughter of a freeman of London, being a *married woman*, if she trades separately from her husband, may be a bankrupt. *Tr. Atkins*. 206.

An *infant*, under 21 years of age, cannot be a bankrupt. *id.* 146.

An *Irishman*, who trades and has contracted debts in England, and comes over here, may have a commission issued against him, at the petition of the creditors here; and the Irish creditors also upon the commission may come in and prove their debts. And generally, if a person carries on a trade in any place belonging to the crown of Great Britain, and comes into England; a commission may be taken out by the creditors in England. And there have been several instances, where persons belonging to the plantations abroad, and which is their sole place of residence, yet happening to be in England, have had commissions of bankruptcy taken out against them here. *id.* 82.

Using the trade of merchandize] But no person who shall adventure any money in the *East-India* company, and shall receive his dividend in merchandize, and shall sell or exchange the same, shall be judged thereby a merchant or trader within any statute for bankrupts. 13 & 14 C. 2. c. 24. s. 3, 4.

So also the members of the corporation of the *English linen company* (for making cambricks and lawns), shall not

upon that account only be liable to bankruptcy. 4 G. 3. c. 37.

Seeking his trade of living by buying and selling] He that buys only, or sells only, is not within this description. *Read. Bankr.*

Also no farmer, grazier, or drover of cattle, shall be deemed a bankrupt. 5 G. 2. c. 30. f. 40.

Also an innkeeper is said not to be a trader within these statutes. 1 Salk. 110.

It is likewise held that a taylor is not within the statutes of bankruptcy, because he gets not his living by buying and selling; but shoemakers, weavers, diers, tanners, and bakers have been held to be within the said statutes. *Read. Bankr.*

Moreover such farmer, if he shall deal in wool, hops, or the like, shall be deemed a bankrupt; otherwise any person by taking a farm, might avoid the statutes. Also, an innkeeper, if he shall buy corn, and sell the same again in quantities which are not consumed in his house, may become a bankrupt. And in the case of *Mayo and Archer*, E. 8. G. A farmer who planted potatoes, but withal bought divers large quantities of potatoes, and sold the same again, was adjudged a bankrupt. *Str.* 513.

Receiving other mens monies or estates into his trust or custody] Bankers, brokers, and factors are within this description. 5 G. 2. c. 30. f. 39.

So also *pawnbrokers*, as it seemeth; being comprehended under the general word *brokers*, which includes the several species of brokerage. *Tracy Att.* 206.

But no receiver general of any taxes granted by act of parliament, shall be deemed a bankrupt. 5 G. 2. c. 30. f. 40.

Begin to keep his house, or otherwise to absent himself] If a man keeps his house for a long time, this doth not immediately make him a bankrupt; but if he conceals himself within his house for a day or hour, to delay or defraud his creditors, he is a bankrupt. 1 Bac. Abr. 250.

For what debts a commission shall be issued, and what is to be done previous thereto.

3. But notwithstanding that a person may have committed any of the abovesaid acts of bankruptcy, yet nevertheless *no commission of bankrupt shall be issued on the petition of one or more creditors, unless the single debt of such creditor, or of two or more being partners, amount to 100l. or of two such creditors petitioning amount to 150l. or of three or more to 200l.*

And the creditor or creditors petitioning, shall before the commission shall be granted, make affidavit before a master in chancery (to be filed with the proper officer) of the truth of the debt, and shall also give 200*l.* bond to the lord chancellor for proving the debt as well before the commissioners, as upon a trial at law, if the due issuing of the commission shall be contested, and also for proving the party a bankrupt, and further to proceed on such commission as hereafter is mentioned: and if it shall appear, that the commission was taken out fraudulently, the lord chancellor may order satisfaction, and may assign such bond to the party injured. 5 *G. 2. c. 30. f. 23.*

4. But these circumstances abovementioned being observed, then the lord chancellor may on such complaint in writing as aforesaid, by commission under the great seal, appoint such wise and honest discreet persons as to him shall seem good, to be commissioners. 13 *El. c. 7. f. 2.*

Issuing the commission.

5. Which commissioners before they act, shall administer to each other the following oath; “I *A. B.* do swear, “that I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute “the several powers and trusts reposed in me as a commissioner in a commission of bankrupt against—and “that without favour or affection, prejudice or malice. “So help me god.” 5 *G. 2. c. 30. f. 43.*

Commissioners oath.

And they shall keep a memorial thereof signed by them, amongst the proceedings. *id. f. 44.*

6. Then the commissioners shall cause notice of the commission being issued to be given in the gazette, and likewise notice in writing to be left at the bankrupt’s usual place of abode, or personal notice to be given if he is in prison. 5 *G. 2. c. 30. f. 1.*

Notice in the gazette of the commission being issued.

7. In which notice also shall be appointed a time and place of meeting of the commissioners; which meeting shall be at three several times within forty-two days, the last of which shall be on the forty-second day; within which time the bankrupt shall surrender himself, and discover his estate and effects. 5 *G. 2. c. 30. f. 1.*

Bankrupt to surrender.

But the lord chancellor may enlarge the time for such surrender and discovery, not exceeding fifty days from the end of the said forty-two days; so as such order be made by him, six days before the expiration of the forty-two. *id. f. 3.*

8. A creditor may chuse whether he will come in under the commission or not: But if he chuses to come in,

Creditor to come in.

he cannot proceed at law likewise for the same debt. Therefore if a creditor has the bankrupt in execution, he must discharge him from the execution, before he can be admitted as a creditor under the commission. And a petitioning creditor, by the very petition, hath made his election. *Tracy Atk.* 83, 152.

Chusing assignees.

9. The first meeting shall be for chusing an assignee or assignees of the bankrupt's estate and effects (which in London shall be at Guildhall). 5 G. 2. c. 30. f. 26.

The money with whom to be lodged.

10. But before assignees are chosen, the major part in value of the creditors may direct how and with whom the money to be received shall remain till divided; to which the assignees shall conform, as often as 100l. shall be got in. 5 G. 2. c. 30. f. 32.

Expences of the commission.

11. And the creditor or creditors who shall sue out the commission, shall prosecute the same at their own expence till assignees be chosen; and the commissioners shall at the meeting for chusing assignees, ascertain such costs, and by writing under their hands order the assignees to reimburse the same, out of the first effects that shall be got in. 5 G. 2. c. 30. f. 25.

Who shall vote for assignees.

12. At the said meeting for chusing assignees, the commissioners shall admit the proof of any creditor's debt, that lives remote from the place of meeting, by affidavit; and also permit any person duly authorized by letter of attorney from such creditors (oath being first made of the due execution thereof, either by affidavit sworn before a master in chancery, or before the commissioners *viva voce*; and in case of creditots residing in foreign parts, such affidavits to be made before a magistrate where the party shall be residing, and together with such creditors letters of attorney, to be attested by a notary publick) to vote in the choice of an assignee or assignees in the place of such creditor: And every creditor shall be admitted to prove his debt, without paying any thing for the same. And the commissioners shall assign the estate and effects unto such person or persons as the major part in value of the creditors, according to the debts then proved, shall chuse. 5 G. 2. c. 30. f. 25, 26.

But no creditor shall so vote, whose debt shall not amount to 10l. *id.* f. 27.

Chusing new assignees.

13. And the commissioners may from time to time appoint new assignees, if the major part of the creditors, whose debts amount to 10l. shall think fit; and the former assignees shall assign to them in ten days after notice of such choice, and of the new assignees acceptance thereof,

of, signified under their hands; on pain of 200*l.* to the creditors with full costs. 5 *G. 2. c. 30. f. 30.*

And the lord chancellor, on petition of any creditors, may order former assignments to be vacated, and new assignments to be made, of the effects not received; and the commissioners shall cause notice thereof to be given in the two next gazettes, and that the debtors do not pay to the assignees removed. *id. f. 31.*

And the new assignees, on filing a supplemental bill, shall be intitled to the benefit of the proceedings in a suit begun in the time of the first assignees; for there is no privity between the bankrupt and the assignees, or at most but an artificial one; and it would be hard, where there have been pleadings, examinations, and the like, in a former suit, that the new assignees should not have the benefit thereof, but should be obliged to begin again. *Tracy Atk. 88.*

14. On certificate under the hands and seals of the commissioners, that such commission is issued, and such person proved before them to become bankrupt, any judge or justice of the peace, shall on application to them for that purpose made, grant their warrant (A) for the taking and apprehending such person, and commit (B) him to the common gaol, there to remain until he be removed by order of the commissioners by their warrant. And the gaoler shall forthwith give notice to one or more of the commissioners, of such person being in his custody; whereupon they shall send their warrant to him to deliver him to the person who shall be named in the warrant, who shall convey him to the commissioners to be examined. And the commissioners by such or any other their warrant, may seize the goods and papers of such bankrupt which shall be in any prison (necessary wearing apparel of himself and wife, and children excepted). 5 *G. 2. c. 30. f. 14.*

Bankrupt not
surrendering, to
be apprehended.

But if the person so apprehended shall, within the time allowed, submit to be examined, and in all things conform, he shall have the same benefit as if he had surrendered. 5 *G. 2. c. 30. f. 15.*

By which last clause it seemeth, that the bankrupt shall not be apprehended and committed, until he shall have made default in not surrendering and making discovery, after due notice as aforesaid.

15. The bankrupt, after assignees shall be appointed, shall deliver up to them on oath (to be administered by a master in chancery, or justice of the peace) all his books of account, papers, and writings not seized by the mes-
senger

Bankrupt to
deliver up.

fenger of the commission, and not before delivered up, and then in his power, and discover such as are in the power of others; and being not in custody, shall at all times attend the assignees, on reasonable notice given to him in writing, or left for him at his place of abode, in order to assist in making out the account of his estate. 5 G. 2. c. 30. f. 4.

Bankrupt to be at liberty to inspect his papers.

16. And such bankrupt having surrendered, shall at all reasonable times, before expiration of the forty-two days, or further term, be at liberty to inspect his papers, in presence of the assignees, or some person appointed by them, and to bring with him for his assistance any persons not exceeding two at a time, and to make extracts from thence, the better to enable him to discover his effects. 5 G. 2. c. 30. f. 5.

Shall be freed from arrest.

17. And in order thereto, he shall be free from arrest or imprisonment of his creditors, in coming to surrender, and from his surrender, for the said forty-two days or further term; provided he was not in custody at the time of surrender. And if he be arrested for debt, or on an escape warrant, coming to surrender, or after surrender within the said term; then, on producing the notice under the hands of the commissioners or assignees, to the officer who shall arrest him, and making it appear to such officer that such notice is signed by them, and giving the officer a copy thereof, he shall be immediately discharged: And if any officer shall in such case detain him, he shall forfeit to him for his own use 5l. a day, by action of debt, with full costs. *id.*

Bankrupt in prison, when the commission is issued.

18. And if the bankrupt be in prison or custody at the time of issuing the commission, and is willing to surrender and be examined, and can be brought before the commissioners and creditors, the expence thereof shall be paid out of his estate: But if he is in execution, or cannot be brought before the commissioners, then they shall attend him in prison; and the assignees may appoint a person to attend him in prison, and to produce to him his books and papers, in order to prepare his last discovery and examination; a copy whereof the assignees shall apply for, and the bankrupt shall deliver to them, ten days before such last examination. 5 G. 2. c. 30. f. 6.

Bankrupt to be examined.

19. And the commissioners may examine him (on oath, 21 f. c. 19. f. 9.) *as well by word of mouth, as on interrogatories in writing*, touching his trade, dealings, estate, and effects; and take down in writing his answer to verbal examinations; which he shall sign: And if he shall refuse to answer, or not answer fully all lawful questions, or refuse

refuse to sign the same ; the commissioners may by warrant commit him to prison without bail, *till he shall submit to them, and full answer make*, and sign the same ; which warrant shall specify such questions. 5 G. 2. c. 30. s. 16, 17.

As well by word of mouth, as on interrogatories in writing] *M. 4 G. 2. K. and Solomon Nathan.* The defendant was committed by the commissioners, who in their warrant recite, that he had been examined before them upon his oath, upon which examination he had notoriously prevaricated ; they therefore commit him without bail or mainprize, until he shall make a full and true disclosure and discovery of his estate and effects, or be otherwise delivered by due course of law. Upon a *habeas corpus* it was moved, that the defendant might be discharged. One reason whereof was because the statute requires, that there shall be interrogatories exhibited for his examination, that so he may have time to consider of his answer, and it can then appear to the court, whether he is bound to answer : perhaps this prevarication might be in a matter they had no power to inquire into. And by the court ; Interrogatories are a term known in law, and import that the questions are put in writing. And they said that *Holt Ch. J.* held, that the bankrupt ought to have a copy, and time to consider of his answer. *Str.* 880.

Or not answer fully] In the aforesaid case of *K. and Solomon Nathan*, another objection against the commitment was, that they commit him, because upon his examination he had *notoriously prevaricated* ; this being too loose an expression, for he might prevaricate, and yet give a full answer at last. And by the court ; Where these special authorities are given, the words of the act ought to be pursued. *Str.* 880.

Till he shall submit to them, and full answer make] In the same case, the commitment was, *until he shall make a full and true disclosure and discovery of his estate and effects, or be otherwise delivered by due course of law.* And by the court ; This commitment not pursuing the words of the statute, the prisoner must be discharged. *Str.* 880.

M. 8 W. Bracy's case. A commitment *until he should conform himself to their authority*, was adjudged ill, because too general ; since they have authority in other matters besides that : and it is best in the like cases, strictly to pursue the statute. *L. Raym.* 100.

Another commitment till discharged by due course of law, adjudged ill for the same reason. *id.* 851.

But if on an *habeas corpus* there appear insufficiency in the warrant of commitment, the judge nevertheless shall commit him to the same prison, to remain as aforesaid, unless it be made appear that he hath fully answered all lawful questions, or unless it appear that he had sufficient reason for not signing. 5 G. 2. c. 30. s. 18.

And if the gaoler shall suffer him to escape, or to go without the walls or doors of the prison; he shall, on conviction by indictment or information, forfeit 500*l.* to the creditors. *id.*

Also, the gaoler shall, on request of any creditor who shall have proved his debt, and producing a certificate thereof under the hands of the commissioners, produce and shew him to such creditor; on pain of 100*l.* to the creditors by action of debt. *id.* s. 19.

20. And by the said statute it is enacted, that if he shall not within the said time surrender himself to the commissioners, and sign such surrender, and also submit to be examined from time to time on oath, and in all things conform to the statutes concerning bankrupts, and also on his examination fully discover all his estate, and how disposed of, except what hath been *bona fide* disposed of in the way of his trade and dealings, and except what hath been laid out in the ordinary expence of his family, and also deliver up to them all his effects (except the necessary wearing apparel of himself, and wife, and children); then in case of any default and wilful omission in not surrendring and submitting to be examined, or in case he shall remove, conceal, or embezzle any part of his estate to the value of 20*l.* or any books of account, or writings relating thereto, with intent to defraud his creditors, and being thereof convicted by indictment or information, he shall be guilty of felony without benefit of clergy, and his estate shall be divided amongst his creditors. 5 G. 2. c. 30. s. 1.

And by the 20 G. 2. c. 52. All offences by bankrupts made felony by the several acts concerning bankruptcy, are excepted out of the general pardon.

21. And every person who shall accept any trust, or conceal any estate of the bankrupt, and shall not in forty-two days after issuing the commission, and notice thereof in the gazette, discover the same in writing to one or more commissioners or assignees, and submit himself to be examined; shall forfeit to the creditors 100*l.* and double value

Bankrupt not surrendring and conforming felony.

Other persons concealing the bankrupt's effects.

value of the estate concealed, by action of debt with full costs. 5 G. 2. c. 30. f. 21.

22. Also the commissioners may examine on oath the bankrupt's wife, like as other persons. 21 J. c. 19. f. 5, 6. Bankrupt's wife may be examined.

23. As also they may examine in like manner every other person, duly summoned before, or present at their meeting, touching the person, trade, dealings, estate, and effects of the bankrupt, and any acts of bankruptcy by him committed; and may take down in writing the answers of verbal examinations, which the party shall sign: And if any of them shall refuse to answer, or not answer fully all lawful questions, or refuse to sign the same, the commissioners may by warrant commit him to prison without bail, till he shall submit to them, and full answer make, and sign the same; in like manner as is said before in section the 19th concerning the bankrupt himself. 5 G. 2. c. 30. f. 16, 17, 18, 19. And every other person.

24. The said commissioners shall have power by their discretions to take such order with the lands of such bankrupt, as well copy or customary hold as freehold, which he had in his own right before he became a bankrupt; or which he purchased jointly with his wife or child to the only use of such bankrupt, or for such use or interest as he may lawfully part with; or with any person of trust to any secret use of such bankrupt; and also with all his money, goods, chattels, wares, merchandizes, and debts; and cause all the same to be searched and appraised to the best value they may; and the same to be sold by deed indented, and inrolled in a court of record; or otherwise ordered for payment of the creditors. 13 El. c. 7. f. 2. Bankrupt's estate to be disposed of by sale, or otherwise.

25. And if any lands or goods shall descend or come to the bankrupt afterwards, before the debts be fully paid; the same shall be disposed of in like manner. 13 El. c. 7. f. 11. Bankrupt's future estate.

26. But this shall not extend to lands assured by such person before he becomes bankrupt, provided the assurance be made *bona fide*, and not to his own use only, or of his heirs; and that the party to whose use they are assured, be not privy to the fraudulent purpose of the bankrupt to deceive his creditors. 13 El. c. 7. f. 12. Lands sold bona fide.

27. Also the commissioners may by deed indented, and inrolled at *Westminster* in six months, sell the bankrupt's estate in tail, whereof no reversion or remainder is in the king or of the king's gift; which sale shall be good against all persons, whom the bankrupt by common recovery, or otherwise, might cut off. 21 J. c. 19. f. 12. Estate tail.

Estate mort-
gaged.

28. Also, if the bankrupt hath conveyed any estate, on condition, or power of redemption, at a day to come, by payment of money, or otherwise; the commissioners before the time of the performance of such condition, may appoint under their hands and seals any person to make tender or payment of money, or other performance, as fully as the bankrupt might have done; and may dispose of the estate redeemed for the use of the creditors, as fully as any other estate of the bankrupt. 21 *J. c.* 19. *f.* 13.

Customary lands, 29. Persons purchasing copyhold or customary lands shall pay fine to the lord of the manor, who shall thereupon admit them. 13 *El. c.* 7. *f.* 4.

In order to save the expence of two fines, it was recommended by the lord chancellor Hardwicke in such case, to leave out the copyhold estate in the assignment; and then the commissioners, when they can meet with a purchaser, may convey to him in the first instance. *Tracy Atk.* 96.

Effects which he hath as executor, 30. Effects which a bankrupt hath as executor only, shall not be applied to the use of the creditors; but shall go according to the direction of the testator. *Tracy Atk.* 101.

Commissioners may break open doors, 31. Commissioners and others by warrant under their hands and seals, may break open the bankrupt's houses, doors, trunks, and chests, where he or any of his goods shall be reputed to be, and seize upon and order his body and goods as before is said. 21 *J. c.* 19. *f.* 8.

Bankrupt fraudulently conveying, 32. If the bankrupt shall convey to any of his children, or other person, any lands or goods, or transfer his debts into other men's names, except the same be conveyed or transferred on marriage of any of his children, or for some valuable consideration; the same may be disposed of in like manner. 1 *J. c.* 15. *f.* 5.

And if the bankrupt shall on his examination be found fraudulently to have conveyed his lands, goods, or estate, to the value of 20*l.* to defraud his creditors, and shall not discover the same, and (if it lie in his power) deliver the same to the commissioners; or if he cannot make it appear to the commissioners, that he hath sustained some casual loss whereby he is disabled to pay what he oweth; he shall, on conviction upon indictment at the assizes or sessions, be set on the pillory in some publick place for two hours, and have one of his ears nailed to the pillory, and cut off. 21 *J. c.* 19. *f.* 7.

Bankrupt compounding with the person suing out the commission, 33. And if any bankrupt, after issuing the commission, shall compound with the person suing out the same, for
more

more than his proportion with the rest of the creditors; such commission may be superseded, and the lord chancellor may award to any creditor petitioning another commission, and the person so compounding shall lose his whole debt, and deliver up to the new commissioners all he shall have so received, for the use of the other creditors. 5 G. 2. c. 30. s. 24.

34. If a debtor to a bankrupt pays him voluntarily, he must pay it over again, but it is otherwise, if he pays him by compulsion of law. *Read. Bankr.* Debtor paying to a bankrupt.

35. But no real creditor of a bankrupt shall be liable to refund to the assignees, any money which before the suing forth the commission was in course of trade received by him of the bankrupt, before he had knowledge of the person's becoming a bankrupt, or being insolvent. 19 G. 2. c. 32. s. 1. Money received of a bankrupt.

36. And no purchaser for valuable consideration shall be impeached, unless the commission be sued out in five years after the person shall become bankrupt. 21 J. c. 19. s. 14. Purchaser not to be impeached after five years.

37. If the bankrupt, at the time he shall become bankrupt, shall by consent of the true owner, have in his possession and disposition any goods whereof he shall be reputed owner, and take upon him the sale or disposition thereof as owner; the commissioners may dispose of the same, as fully as any other part of the bankrupt's estate. 21 J. c. 19. s. 11. Bankrupts conveying their goods, and keeping possession.

38. If any estate of the bankrupt be extended after he is become bankrupt, by any person under pretence of his being an accountant or indebted to the king; the commissioners may examine on oath, whether the said debt were due to such debtor or accountant, on any contract originally made between such accountant and the bankrupt; and if it was made with any other person than the said accountant, or for the use of any other person, the commissioners proceedings shall be available against the said extent. 21 J. c. 19. s. 10. Debt due to the king.

Otherwise, an extent of the crown is available against a commission of bankruptcy; the crown not being within the statutes of bankrupts. *Tracy Attk.* 262.

39. The commissioners or assignees may state accounts between the bankrupt and his debtors or creditors, and set one debt against another, and the balance only shall be paid on either side. 5 G. 2. c. 30. s. 28. Commissioners may state account.

40. Also the assignees with consent of the major part in value of the creditors present at a meeting pursuant to notice to be given in the gazette, may submit disputes relating May refer to arbitration and compound.

lating to the bankrupt's estate to arbitration; and may compound for debts owing to the bankrupt. 5 G. 2. c. 30. §. 34, 35.

Joint traders.

41. Creditors of a joint estate, where there are no separate creditors, may exhaust both the joint and separate estate; but where there are both joint and separate creditors, the joint creditors (as they gave credit to the joint estate) shall have first their demand on the joint estate, and the separate creditors (as they gave credit to the separate estate) shall have first their demand on the separate estate: But if there be a surplus of the separate estate, the joint creditors are intitled to it; for a bankrupt has no right to any thing, till they are fully satisfied. But for the saving of expences, where there is a joint commission depending, it seemeth best for the separate creditors not to take out a separate commission, but to apply to the court for an order to be admitted to come in and prove their debts under the joint commission. *Tracy Atk.* 67, 138, 227.

Reward for discovering.

42. Every person who shall, after the time of surrender, voluntarily make discovery to the commissioners or assignees, of any part of the bankrupt's estate, not before come to the knowledge of the assignees, shall have 5 *l.* per cent. and such farther reward as the assignees and the major part of the creditors in value, present at any meeting, shall think fit. 5 G. 2. c. 30. §. 20.

Persons having security, to have only their share.

43. Creditors having security by judgment, statute, recognizance, specialty with penalty or without, or other security, or having no security, or having made attachments in *London*, or elsewhere by any custom, of the goods of such bankrupt, whereof there is no execution or extent served and executed upon the lands, goods, or estate of such bankrupt before he shall become bankrupt, shall not be relieved for more than a rateable part with the other creditors, notwithstanding any penalty or greater sum contained in such security. 21 J. c. 19. §. 9.

Securities for money not become due.

44. Persons taking securities payable at a future day, for goods delivered to persons who shall become bankrupts before the time of payment, shall be admitted to prove their securities, and receive their proportion, deducting interest from the time of payment to the time it would have become due. 7 G. c. 31. §. 1, 2.

Bottom-ree; insurance.

45. The obligor in any bottom-ree, or respondentia bond, and the assured in a policy of insurance, shall be admitted to claim; and after the loss or contingency, to prove the debt thereon, in like manner as if the same had happened

happened before issuing the commission. 19 G. 2. c. 32.

f. 2.

46. The mortgagee may chuse whether he will come Mortgagee, in as a creditor. *Read. Bankr.*

47. A landlord may distrain for his rent upon a bank-Landlord for his rupt's goods, either before or after the assignment; but if rent, he neglects to do it, and suffers them to be removed, he can only come in upon an average with the rest of the creditors. But if the goods remain on the premises, he may distrain them, even after the messenger is in possession, or after sale by the assignees. And he is not restricted to one year only, as in the case of executions, but may distrain for his whole arrear. *Tracy Atk. 102, 3.*

48. An apprentice, for money to be refunded given Apprentice, with him on his binding, shall come in only amongst the rest of the creditors *pro rata*. *Tracy Atk. 149.*

49. Where debts carry interest, the same shall be con- Interest how to
tinued down to the date of the commission; but note- be computed.
creditors have no right to prove interest upon them, unless it is expressed in the body of the notes. Even at law, where notes are for value received, and interest is not expressed, the jury do not give the plaintiff, in an action upon the notes, interest for them, but by way of damages only; and commissioners of bankrupts cannot award damages. *Tracy Atk. 151, 259.*

50. Assignees shall not be answerable for losses occa- Assignees how
sioned by their own necessary acts; but if an assignee far answerable for
trusts a person with the payment of money, who fails, losses.
and the money is lost, such assignee shall be answerable over to the creditors, unless he consulted the body of the creditors in the appointment of such agent. *Tracy Atk. 87.*

51. An assignee, who is an officer of the court, and an officer of the commission, shall not be allowed to stop a Assignee cannot
person's share in the dividend, on account of his own retain for money
private debt, which is owing to him from that person: due to himself.
he hath his remedy at law, and ought not to intermix his own private affairs with the commission, to which he is only a trustee. *Tracy Atk. 90.*

52. If any person shall swear that any sum is due to Swearing to a
him from the bankrupt, which is not due, or more than false debt.
is due; he shall suffer as in cases of perjury, and more-
over forfeit double to the creditors. 5 G. 2. c. 30.

f. 29.

53. The assignees shall keep books of account of all Assignees to
sums and effects received; which every creditor who hath keep books.
proved his debt may inspect at all seasonable times. 5 G.

2. c. 30. f. 26.

First dividend.

54. The assignees shall, after four months, and within twelve months after issuing the commission, cause at least twenty-one days notice to be given in the gazette, of the time and place the commissioners and assignees intend to meet to make a dividend; at which time, the creditors who have not before proved their debts may prove them: and the assignees shall produce fair accounts, and be sworn to them before the commissioners, if required by the creditors; and they shall be allowed therein all reasonable expences. And the commissioners may then order, under their hands, a distribution (to every creditor a portion ratelike, according to the quantity of his debts, 13 *El. c. 7. s. 2.*); which order shall contain the time and place of making it, and the total of the debts proved, and of the money in the hands of the assignees, and how much in the pound shall be then distributed; one part of which order shall be filed among the proceedings under the commission, and each of the assignees shall have a duplicate thereof. And the assignees shall take receipts for the same, in a book to be kept for that purpose. 5 *G. 2. c. 30. s. 33.*

Allowance to the bankrupt.

55. The bankrupt surrendering and conforming, shall be allowed 5*l. per cent.* if after such allowance, the neat produce of his estate will pay 10*s.* in the pound; so as the said 5*l. per cent.* amount not to above 200*l.*

And if the neat produce will pay 12*s. 6d.* in the pound; he shall be allowed 7*l. 10s. per cent.* so as it amount not to above 250*l.*

And if it will pay 15*s.* in the pound, he shall be allowed 10*l. per cent.* so as it exceed not 300*l.*

If the neat produce will not pay 10*s.* in the pound, the bankrupt shall be allowed so much as the assignees and commissioners shall think fit, not exceeding 3*l. per cent.* 5 *G. 2. c. 30. s. 7, 8.*

But the same shall not be paid to the bankrupt, till a final dividend shall be made; because until that time, creditors may still come in to prove debts. *Tracy Atk.* 208.

Certificate and allowance there-
of.

56. But no discovery on oath shall intitle the bankrupt to the said allowance, unless the commissioners shall, under their hands and seals, certify to the lord chancellor, that he hath made a full discovery of his estate, and in all things conformed himself; and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery; and unless four parts in five in number and value of the creditors, who shall be creditors for not less than 20*l.* and who

who have proved their debts, or some person by them authorized thereto, shall sign such certificate, and testify their consent to such allowance and certificate, and to the bankrupt's discharge, to be also certified by the commissioners; but the commissioners shall not certify the same, till they have proof by affidavit of such creditors, or of the person by them respectively authorized, signing the said certificate, and of the power by which any person is so authorized (and the letter of attorney of a creditor residing in foreign parts, attested by a notary publick, shall be sufficient evidence in such case of such power, 24 G. 2. c. 57. s. 10.) which said affidavit, together with such power to sign, shall be laid before the lord chancellor with the certificate in order for allowing the same;—and unless the bankrupt make oath, that the certificate and consent of the creditors were obtained fairly and without fraud; and unless the certificate shall, after such oath, be allowed and confirmed by the lord chancellor, or two of the judges to whom he shall refer it: and any of the creditors shall be allowed to be heard against making the certificate, and against the confirmation of it: nor shall any commissioner sign the certificate, till after four parts in five in number and value of the creditors shall have signed it. 5 G. 2. c. 30. s. 10.

And every security given to the use of any creditor, to induce him to sign such allowance or certificate, shall be void. *id.* s. 11.

Moreover, no bankrupt shall be intitled to such allowance, who hath upon marriage of any child given above 100 l. unless he prove by his books, or upon his oath, that he had remaining at the time sufficient to pay his debts; or who hath lost in one day the value of 5 l. or in the whole the value of 100 l. in 12 months next before his becoming bankrupt, at cards, dice, tables, tennis, bowls, billiards, shovelboard, cock-fighting, horse-races, dog-matches, foot-races, or other pastime or game, or in bearing a part in the stakes, or by betting; or hath in 12 months before lost 100 l. by contracts for the stock of any company, or publick funds, where the contract was not to be performed within a week, or where the stock was not actually transferred. 5 G. 2. c. 30. s. 12.

And moreover, by 24 G. 2. c. 57. When any person shall fraudulently swear, before the major part of the commissioners, or by affidavit exhibited to them, that a sum of money is due to him from the bankrupt, which shall in fact not be really owing; and shall, in respect of such fictitious debt, sign the certificate for such bankrupt's discharge,

charge; in such case, unless the bankrupt shall, before the major part of the commissioners have signed the certificate, by writing signed by him and delivered to one or more of the commissioners or assignees, disclose the fraud, and object to the reality of such debt, the certificate shall be void, and the bankrupt shall not be intitled to his discharge or allowance. *f. 9.*

Bankrupt's duty
after allowance.

57. The bankrupt, after allowance of the certificate, shall attend on notice in writing from the assignees, to settle accounts, and shall have 2 s. 6 d. a day allowed for attendance; and if he shall neglect or refuse, he shall, on oath made by the assignees before the commissioners, be apprehended and committed to close gaol, by warrant of the said commissioners, till he conform. *5 G. 2. c. 30. f. 36.*

Commissioners
pay.

58. To prevent expences, no money shall be paid out of the effects for eating or drinking of the commissioners, or of any other person; nor shall the commissioners have above 20 s. each for each meeting; nor any schedule be annexed to the deed of assignment: Commissioners acting contrary hereto, shall be disabled for ever to act as such. *5 G. 2. c. 30. f. 42.*

Half fees on re-
newing the com-
mission.

59. If by the death of commissioners, or otherwise, it be necessary to renew the commission, half fees only shall be paid. *5 G. 2. c. 30. f. 45.*

Attorney's bill.

60. All bills of fees or disbursements demanded by any solicitor, clerk, or attorney, shall be settled and certified by a master in chancery, who shall have for the same 20 s. *5 G. 2. c. 30. f. 46.*

Bankrupt dying.

61. Bankrupt dying before distribution, shall not hinder the distribution. *1 J. c. 15. f. 17.*

And if the certificate be allowed in the life time of the bankrupt, it is good, tho' it be not confirmed by the lord chancellor till after his death: for the operative force of it arises from the consent of the creditors; and when confirmed, it hath its effect from the beginning. *Tracy Aik. 77.*

And the allowance to the bankrupt, being a vested interest, shall go to his executor. *Tracy Aik. 208.*

Second dividend.

62. In 18 months after issuing the commission, the assignees shall make a second dividend, and shall cause notice to be inserted in the gazette of the time and place the commissioners intend to meet to make a second distribution, and for the creditors who have not proved their debts to come and prove them: And at such meeting, the assignees shall produce their account on oath, and what is in their hands shall by order of the commissioners be

be forthwith divided. Which second dividend shall be final, unless a suit in law or equity be depending, or part of the estate standing out that cannot have been disposed of, or that the major part of the creditors shall not have agreed to be sold, or unless some other or future estate of the bankrupt shall come to the assignees; which they shall, as soon as may be, convert into money, and in two months distribute the same in like manner. 5 G. 2. c. 30. *f. 37.*

But no suit in equity shall be commenced by the assignees, without consent of the major part in value of the creditors who shall be present at a meeting of the creditors pursuant to notice in the gazette. *id. f. 30.*

63. If the bankrupt shall be taken in execution, or detained in prison, for debt owing before his bankruptcy, by reason that judgment was obtained before the certificate was allowed and confirmed; any judge of the court, on producing the certificate, may order him to be discharged without fee. 5 G. 2. c. 30. *f. 13.*

And if the bankrupt's estate will pay 15s. in the pound, he shall be discharged from all debts by him owing at the time he became bankrupt: And if he shall be arrested or prosecuted for any debt due before such time, he shall be discharged on common bail, and may plead in general, that the cause of action did accrue before he became bankrupt, and may give this act, and the special matter in evidence; and the certificate of his conforming, and allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining the certificate; and a verdict shall pass for the defendant, unless the plaintiff can prove that the certificate was obtained fraudulently, or can make appear a concealment by the bankrupt to the value of 10l. And if the plaintiff is cast, the defendant shall have full costs. 5 G. 2. c. 30. *f. 7.*

But if any commission of bankruptcy shall issue against any person who shall have been discharged by this act, or shall have compounded with his creditors, or delivered to them his estate, and been released by them, or been discharged by an act of insolvency, then the body only of such person conforming shall be free from arrest and imprisonment, but his future estate shall remain liable to his creditors (his tools of trade, necessary household goods and furniture, and necessary wearing apparel of himself and wife and children only excepted), unless the estate of such person shall produce clear of all charges 15s. in the pound. *id. f. 9.*

Sureties not discharged.

64. But the bankrupt's discharge, and allowance of his certificate, will not preclude the creditors from proceeding against his sureties, *Tracy Atk.* 84.

Commissioners to account and pay the overplus.

65. The commissioners shall, on lawful request of the bankrupt, declare how they have bestowed his lands and goods, and pay to him the overplus, if any there be. 13 *El.*

Proceedings to be entred of record.

c. 7. f. 4.

66. On petition to the lord chancellor, he may order the proceedings to be entred of record, to be at any time searched and produced as evidence. 5 *G. 2. c. 30.*

f. 41.

Remedy on commissioner being sued.

67. Commissioner sued for any thing done on the statute of 13 *El.* and 1 *J.* may plead the general issue; and if he recovers, shall have his costs. 1 *J. c. 15. f. 16.* But there is no provision for any thing done by them, or by the assignees, on any of the subsequent statutes.

King's death not to abate the commission.

68. The commission shall not abate by the death of the king. 5 *G. 2. c. 30. f. 45.*

Note; The Act of 5 *G. 2. c. 30.* so often mentioned above, is but temporary, and by the last continuance is of force till *Sept. 29. 1771, &c.*

A. Warrant to apprehend a bankrupt.

Westmorland. } To————

WHEREAS a certificate under the hands and seals of ——— hath this day been produced before me ——— setting forth that a commission of bankruptcy is issued against ——— and that the said ——— is proved before them the said ——— being the major part of the commissioners authorized in the said commission, to be a bankrupt; and whereas application hath been made to me by ——— by order of the said commissioners, for the apprehending the said ——— These are therefore to require you, on sight hereof, to take and apprehend the said ——— and bring him before me or some other of his majesty's justices of the peace for the said county, to be proceeded against according to law. Given under my hand and seal this ——— day of, &c.

B. Commit-

B. Commitment thereupon.

Westmorland. { To the keeper of the common gaol
at——— in the said county, J. P.
esquire, one of his majesty's ju-
stices of the peace for the said
county, sendeth greeting :

I Send to you herewith——— being duly certified to be a bankrupt, requiring you to keep him in the said gaol until he shall be discharged according to law. Given———.

Bargain and Sale. See Inrollment.

Barratry.

I. *What it is.*

II. *How punished.*

I. *What it is.*

THIS word *barratry* we have received either from the Danes, or Normans, or both: for *baratta* in the Danish, and *baret* in the Norman, do equally signify a quarrel or contention.

And a *barrator*, in legal acceptation, doth signify a common mover, exciter, or maintainer of suits or quarrels, either in courts, or in the country. 1 Inst. 368. 1 Haw. 243.

A common mover] It seems clear, that no one can be a barrator in respect of one act only; for every indictment for such crime must charge the defendant with being a common barrator. 1 Haw. 243, 4.

Mover, exciter, or maintainer] Yet it seemeth, that an attorney is in no danger of being judged guilty of an act of barratry, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. 1 Haw. 243.

Also, it hath been holden, that a man shall not be adjudged a barrator, in respect of any number of false ac-

tions brought by him in his own right; for in such cases he is liable to costs. 1 *Haw.* 243.

In courts] Either courts of record; or not of record, as in the county, hundred, or other inferior courts. 1 *Inst.* 368.

Or in the country] In three manners: 1. In disturbance of the peace. 2. In taking or keeping of possessions of lands in controversy, not only by force, but also by subtilty and deceit, and most commonly in suppression of truth and right. 3. By false inventions, and sowing of calumniations, rumors, and reports, whereby discord and disquiet may grow between neighbours. 1 *Inst.* 368.

II. How punished.

By the statute of 34 *Ed. 3. c. 1.* *The justices of the peace shall have power to restrain all barrators, and to pursue, arrest, take and chastise them, according to their trespasss or offence.*

And altho' this statute doth not create the offence, but supposes it at common law, and only appoints the punishment, yet an indictment of barratry, concluding *against the form of the statute*, is holden to be good, and agreeable to many precedents. *Gro. Eliz.* 148. 1 *Haw.* 244.

But it hath been resolved, that such indictment is not good, without also concluding *against the peace*; for this is an essential part of it, as being an offence by the common law. 1 *Haw.* 244.

And it hath been holden, that an indictment of this kind may be good, without alledging the offence at any certain *place*; because from the nature of the thing, consisting of the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, that a trial ought to be by a jury from the body of the county. 1 *Haw.* 244.

Which case, and that of a common scold, seem to be the only offences for which a general indictment will lie, without shewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath settled it to be sufficient to charge a man generally as a common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved against him; for otherwise it will be impossible to prepare

a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances; and therefore the court generally will not suffer the prosecution to go on in the trial of the indictment, without such note being given to the defendant. 1 *Haw.* 244. 2 *Haw.* 226, 7.

As to the kind and manner of punishment, it is said, that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour; and if he be of any profession relating to the law, he ought also to be farther punished, by being disabled to practice for the future. 1 *Haw.* 244.

Warrant for a barrator.

Westmorland. { To the constable of——

WHEREAS complaint upon oath hath been made unto me———one of his majesty's justices of the peace in and for the said county, that A. O. of—— in the said county, yeoman, on the——day of——in the——year of the reign of——and on divers other days and times as well before as afterwards at——aforesaid in the county aforesaid, and at divers other places within the county aforesaid was and yet is a common barrator, and daily disturber of the peace of our sovereign lord the king, and also a common brawler, wrangler, fighter, scandalizer, and sower of sedition, suits, and disorders between his neighbours, and other the liege people and subjects of our said sovereign lord the king, to the great damage and disturbance of the said liege people and subjects of our said lord the king, and against the peace of our said lord the king, and to the evil example of all others in the like case offending: These are therefore to command you forthwith to bring the said A. O. before me to answer unto the said complaint, and to find sureties for his personal appearance at the next general quarter sessions of the peace to be holden for the said county, then and there to answer unto an indictment on the behalf of our said sovereign lord the king to be preferred against him for the said offences. Hereof fail not upon the peril that shall ensue thereon. Given under my hand and seal the——day of——

Bastards.

Concerning the settlement of bastard children,
see title *Poor*.

- I. Who shall be deemed a bastard.*
- II. Securing the reputed father.*
- III. Order of filiation, and appealing therefrom.*
- IV. Punishment of the mother and reputed father.*
- V. Mother or reputed father running away.*
- VI. Murdering a bastard child.*
- VII. Capacity of a bastard child as to inheritance.*

I. Who shall be deemed a bastard.

Meaning of the
word bastard.

1. **T**HE word *bastard* seemeth to have been brought unto us by the *Saxons*; and to be compounded of *base*, vile or ignoble, and *start*, or *steert* signifying a rise or original. By the common people in the north (amongst whom is preserved much of the ancient *Saxon*) it is still pronounced *bastart*, denoting a person sprung from a vile or spurious origin; even as an *upstart* is a person suddenly risen from a mean extraction in general.

Bastard born in
lawful marriage.

2. Lord *Coke* says, We term all by the name of bastards that are born out of lawful marriage. By the common law, if the husband be within the four seas, that is, within the jurisdiction of the king of *England*, if the wife hath issue, no proof is to be admitted to prove the child a bastard, unless the husband hath an apparent *impossibility* of procreation, as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244.

M. 6 G. 2. Lomax and Holmden. In ejectment the question on a trial at bar was, whether the lessor was son and heir of *Caleb Lomax*, esquire, deceased; which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted

admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an *impossibility*, but an *improbability* only; that was not thought sufficient, and there was a verdict for the plaintiff. *Str.* 940.

And it is said, that formerly if the husband was within the four seas, no proof of *non-access* to his wife was admitted, but the child was deemed to be his; but as this notion was built on no rational foundation, it is now entirely departed from; and though the husband and wife are both in *England*, if there is sufficient proof that he had no access to her, the child will be a bastard. And this was determined in the case of *Pendrell* and *Pendrell*, *M.* 5 G. 2. which was an issue out of chancery, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong Evidence of no access. And it was agreed by court and counsel, on the trial at *Guildhall* before Lord Ch. J. *Raymond*, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the court of chancery acquiesced in the determination. *Str.* 925. *Andr.* 9.

T. 10 G. 2. *K.* and the inhabitants of *Bedall* in *Yorkshire*. An order was made upon one *Moor*, as the putative father of two bastards, born of the body of *Elizabeth* the wife of *Richard Sharplefs*: in which it is stated, that for seven years before, the husband had had no access to her, she having never seen or heard of him all that time, and not knowing whether he was alive or dead; which the justices adjudge to be true, and that *Moor* is the father of them, and order him to provide accordingly. Upon appeal to the sessions, the case is stated with some variation: that in 1728, she was married to *Sharplefs*, then a soldier in *Mullin's* troop, in a barn, by a person not in the habit of a clergyman; that there had been no access for seven years: but it appearing by a certificate from the commissary general's office, and from the evidence of *Simon Clarkjon*, that one *Richard Sharplefs*, who he was told was formerly

formerly in *Mullin's* troop, was mustered as a private gentleman in the third troop of horse guards, from *June* 25. 1733. to *Feb.* 23. 1736. though *Clarkson* said he could not take upon him to swear that it was the same *Richard Sharplefs* pretended to be married as aforesaid; upon this supposition of the husband's being alive, the sessions were of opinion, the children were not bastards, and reversed the order of the two justices. And now upon debate, the order of sessions was quashed, and the order of two justices confirmed: for it being stated in both orders, that there was no access according to the case of *Pendrell* and *Pendrell*, it was immaterial whether the husband was alive or not. *Str.* 1076.

And, *M.* 10 *W. K.* and *Abberton*. The case was, a feme covert, during the absence of her husband at *Cadiz*, was brought to bed of a bastard; and her husband was not in *England* from the time of her conception, till she was brought to bed. The question was, whether this child was a bastard, especially within the words of the statute of the 18 *Eliz.* (hereafter following) which saith, *children begotten and born out of lawful matrimony*; which cannot be said of this case, the mother being married at the time of the birth of the child; and if such a mother should kill such a child, she could not be guilty of murder within the statute of the 21 *J. c.* 27. But by the court; He is a bastard who is begotten and born of a feme covert, whilst the husband is beyond the four seas. And in a real action, if general bastardy was pleaded, the bishop ought to certify such a one a bastard. And where a man is bastard, he is such to all purposes, and why not within the 18 *El.* For though the statute of 21 *J.* is a penal law, yet the act of 18 *El.* is a remedial law. *L. Raym.* 395, 396.

How far the wife's oath shall be admitted in such case.

3. But this non-access of the husband ought to be proved otherwise than upon the wife's oath; as in the following case; *M.* 8 *G.* 2. *K.* and *Reading*. The defendant *Reading* was adjudged by an order of bastardy, to be the putative father of a bastard child, begotten of the wife of one *Almont* of *Sherborn*. The said woman on the appeal, gave evidence, that the said *Reading* had carnal knowledge of her body in or about *August* 1732, and several times since; and that her husband had no access to her from *May* 1731, to the time of her examination in that court, being the 3d of *Oct.* 1733. and that the said *Reading* was the father of the said child. And the question on removal of the same into the king's bench was, whether the wife in this case could be admitted as an evidence for or against her husband, and to bastardize her own child. And the whole court were of opinion, that the wife could be a witness to

no other fact but that of incontinence, and that this she must be admitted to be witness to from the necessity of the thing; but not to the absence of her husband, which might properly be proved by other witnesses; and likened it to the case of hue and cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, because that may be proved by others. *Sess. Ca. V. 2. 175.*

And in the case of *K. and Rooke, M. 26 G. 2.* The order of the two justices states; It appears to us by examination of *Dorothy* the wife of the reverend Mr. *Henry Bird*, that she lived separate from her husband from *Michaelmas 1750*, to *February 1752*; and that she has not in all that time seen or been with him, he being a prisoner in *York Castle*: That *John Rooke* had carnal knowledge of her body, on the 30th of *January 1750*, and got her with child of the bastard. Exception was taken, that the wife in this case was an incompetent witness. By *Lee Ch. J.* and the court: How far the evidence of the wife is to be admitted upon orders of bastardy, is now settled in the case of *K. and Reading*; where the wife appeared upon the order to be the only witness to charge the putative father: upon this, the order was quashed; and the reason given by the court was, that the wife might be admitted to prove the act of adultery *ex necessitate*, for of that there could be no other evidence; but not to prove other facts, of which there may be witnesses. This case being similar, must be determined upon the authority of that case. The wife's examination alone does not make the order bad, but the facts to which she is examined. The necessity of the thing excepts her, as to the fact of adultery, out of the general rule; but not as to the fact of no access, for that may be proved by particular circumstances examinable by the justices below. But upon this order she appears to be the only evidence; and her declarations are not admissible to bastardize her issue. And the order was quashed.

But in the case of *K. and Bedall* abovementioned, The order reciting, that on the examination of the mother, and on other proof, it appeared that her husband had no access to her, was held to be good; for there the woman's oath is not set forth as the only evidence, but other proof, which must be intended legal proof. *Andr. 8.*

4. *M. 5 An. St. George's and St. Margaret's Westminster.* Child born do-
Where a woman is separated from her husband by a divorce ting a divorce.
& menja & there, the children she has during the separation
are

are bastards; for a due obedience to the sentence shall be intended, unless the contrary be shewed: but if a husband and wife, without sentence, do part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved, for access shall be intended. But if a special verdict find the man had no access, it is a bastard; and so was the opinion of Lord Hale, in the case of *Dickins and Collins*. 1 Salk. 123.

Widow having a
child after her
husband's death.

5. The law hath appointed no exact certain time, for the birth of legitimate issue, by the widow after the death of her husband. 1 *Dart.* 726.

M. 7 J. Allop and Bawtrell. The question was, whether, the woman being delivered of a child forty weeks and nine days after the death of her husband, such child should be deemed a bastard. And it was proved, that her deceased husband's father did much abuse her, and caused her to lie in the streets; and three physicians (two of them being doctors of physick) made oath, that the child came in time convenient to be the child of the party who died; and that the usual time for a woman to go with child, is nine months and ten days, to wit, solar months, at thirty days to the month, and not lunar months; and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months or more. And the physicians farther affirmed, that a perfect birth may be at seven months, according to the strength of the mother or child, which is as long before the time of the proper birth. And by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind. And the child was adjudged to be legitimate. *Cro. Ja.* 541.

II. Securing the reputed father.

By the 6 G. 2. c. 31. Whereas the laws now in being are not sufficient to provide for the securing and indemnifying parishes and other places, from the great charges frequently arising from children begotten and born out of lawful matrimony; it is enacted, *That if any single woman shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable, to any parish or extraparochial place; or shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish or extraparochial place, and shall in either of such cases, in an examination (A) to be taken in writing, upon oath, before one justice of the county, city, or town corporate, where such*

such parish or place shall lie, charge any person with having gotten her with child, it shall be lawful for such justice, upon application made to him by the overseers of the poor of such parish, or one of them, or by any substantial householder of such extraparochial place, to issue out his warrant (B) for the immediate apprehending such person so charged as aforesaid, and for bringing him before such justice, or before any other of his majesty's justices of the peace of such county, city, or town corporate: And the justice before whom such person shall be brought shall commit (C) him to the common gaol or house of correction, unless he shall give security (D) to indemnify such parish or place, or shall enter into a recognizance (E) with sufficient surety, upon condition to appear at the next general quarter sessions, or general sessions, of the peace, to be holden for such county or liberty, and to abide and perform such order or orders as shall be made, in pursuance of an act passed in the 18th year of the reign of her late majesty queen Elisabeth, concerning bastards begotten and born out of lawful matrimony. f. 1.

Issue out his warrant for the immediate apprehending] If the constable, having a warrant to apprehend the reputed father, shall willingly or negligently suffer him to escape; he may be bound over to the sessions, and there indicted, fined, and imprisoned; and under the influence thereof be compelled to make satisfaction to the prosecutors.

Unless he shall give security] Whether a bond or other security ought to be made to the churchwardens and overseers and their successors, or to their executors or administrators, hath been questioned; concerning which, the author of the *Readings upon the statutes* saith thus: Those gentlemen who have taken upon them, to direct the officers, to have such bonds or other securities made to them and their successors, would do well to consider, whether the churchwardens and overseers are such a corporation as can purchase, sue and be sued: And whether bonds, being things in action, it may not be difficult for the successors of the churchwardens and overseers, to whom they were made, to maintain an action for the goods of their church. But they are not such a corporation, as can take or purchase lands, or take securities for the use of their church, except in London. And it never was pretended, that the churchwardens and overseers of the poor are a corporation in any respect in relation to the poor, and consequently can neither sue nor be sued as such. *Read. Bast.*

And indeed, upon the whole, the taking of a bond in any kind seemeth not so convenient for the parish, as an

order made by the justices; because the suing upon a bond is both tedious and expensive, whereas the course of carrying an order into execution is very short and easy. But then, on the other hand, a bond will bind a man's executors; but the order of the justices being obligatory only upon the man himself, when he dies, the order dieth with him.

To appear at the next general quarter sessions] It hath been usual, to bind such person to appear, not at the next sessions generally, but at the next sessions after the child shall be born; upon a principle of convenience, lest if the child should not be born, or the mother not be able to go before the justices in order to filiate the child, before the next sessions, the reputed father should be gone, and the design of the act be frustrated. But upon the face of the act it seemeth, that the justice shall bind him, not only to appear at the sessions, but also to abide such order as shall be made in pursuance of the act of the 18 *El.* Indeed, it doth not appear very clearly, for what purpose he shall be bound by the justice to appear at the sessions at all: it cannot be by way of punishment; for it may turn out, upon hearing the cause, that he shall not be the reputed father.—But the words of the act must be pursued; and therefore he must be bound *to appear at the next general quarter sessions* [or, *general sessions*] *of the peace* to be holden for such county or liberty, *and to abide and perform such order or orders as shall be made in pursuance of an act passed in the 18th year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony.*

Elizabeth] This statute recites the name of queen *Elizabeth* with the letter *f*; whereas the statutes themselves of that queen's reign do always exhibit her name with a *z*. Which is noted here only, as not exactly agreeable to that precision which ordinarily is required in reciting acts of parliament in cases penal.

And if such woman shall die, or be married, before she shall be delivered, or miscarry of such child, or shall appear not to have been with child at the time of her examination, such person shall be discharged from his recognizance at the next sessions, or immediately released out of custody by warrant of one justice residing in or near the limits where such parish or place shall lie. s. 2.

And on application made by any such person, who shall be committed to any gaol or house of correction, or by any person on his behalf, to any justice residing in or near the limits where such

such parish or place shall lie; such justice shall summon the overseers of the poor of such parish, or one or more substantial householders of such extraparochial place, to appear before him at a time and place to be mentioned in such summons, to shew cause why such person should not be discharged: And if no order shall appear to have been made, in pursuance of the 18th of Elis. within six weeks after such woman shall have been delivered, such justice may discharge him from his imprisonment. f. 3.

But it shall not be lawful for any justice, to send for any woman, before she shall be delivered, and one month after, in order to her being examined concerning her pregnancy; or to compel any woman, before she shall be delivered, to answer any questions relating to her pregnancy. f. 4.

To compel any woman] M. 11 G. K. and Chandler. Indictment for secreting a woman big with an illegitimate child, so that she could not be had to give evidence about the father. The defendant demurred. And by the court, Judgment must be given for the defendant, for the child cannot be illegitimate before it is born, there being always a possibility that it may be born in lawful wedlock. And by this act the woman is not to be compelled. Str. 612. L. Raym. 1368.

III. Order of filiation and appealing therefrom.

If security hath not been given to indemnify the parish, the next thing in the course of proceeding is the order of filiation and maintenance to be made by the justices, founded on these two statutes following:

By the 18 El. c. 3. *Concerning bastards begotten and born out of lawful matrimony, the said bastards being now left to be kept at the charges of the parish where they be born, to the great burden of the same parish, and to the evil example and encouragement of lewd life, it is enacted, that two justices (1 Q.) in or next unto the limits where the parish church is, within which parish such bastard shall be born, upon examination of the cause and circumstance (F), shall and may by their discretion, take order (G) as well for the punishment of the mother and reputed father, as also for the better relief of such parish, in part or in all; and shall and may, by like discretion, take order for the keeping of every such bastard child, by charging such mother or reputed father, with the payment of money weekly, or other sustentation for the relief of such child, in such wise as they shall think meet and convenient: And if after the same order by them subscribed under their hands, the mother*

or reputed father, upon notice thereof, shall not for their part observe and perform the said order, that then every such party so making default in not performing the said order, to be committed to ward to the common gaol, there to remain without bail or mainprize, except he or she shall put in sufficient surety (H) to perform the said order, or else personally to appear at the next general sessions of the peace, to be holden in that county where such order shall be taken; and also to abide such order, as the said justices, or the more part of them, then and there shall take in that behalf (if they then and there shall take any); and that if at the said sessions, the said justices shall take no other order, then to abide and perform the order before made, as is abovesaid.

And by 3 Car. c. 4. *All justices of the peace within their several limits and precincts, and in their several sessions, may do and execute all things concerning the statute of 18 El. that by the justices in their several counties are by the said statute limited to be done.* f. 15.

The said bastards being now left to be kept at the charges of the parish where they be born] For at that time they could have no other settlement. There were only two kinds of settlements then existing; the one was by birth, and the other where the person should have resided for the most part during the space of three years. So that till the child should be three years of age, it could possibly have no other settlement. And the place of birth continues to be the settlement of bastard children still, unless in some few excepted cases.

And hereby there is an inconvenience, which frequently happens to parishes, where the mother resides under a certificate, and not being then become chargeable, cannot be removed. Indeed, if she be sent to any place, then known or probably suspected to be with child; the justices possibly may bring such practice under the general rule of fraud and collusion, and consequently determine the settlement not to be obtained by such birth. Otherwise, there seemeth to be no remedy. For the clause sometimes inserted in certificates, acknowledging the settlement of such bastard child when it shall be born, and promising to receive and provide for it, seemeth to be void. For it is absurd to acknowledge a child unborn to be legally settled any where. And for the churchwardens and overseers of such place to promise to provide for it, is more than they have authority to do as publick officers; and they cannot charge the parishioners with what the law doth not charge them.

Two justices in or next unto the limits where the parish church is] By this measuring, as it were, from the parish church, it seemeth that no other justices can intermeddle. And in this matter this statute of the 18 *El.* is different from most other statutes; for generally where power is given to two justices, the statutes express that two or more justices may do such a thing; but here the statute saith only, that two justices, dwelling in or next unto the parish, shall have power to take order therein. And Mr *Dalton* makes a *query*, what shall be done, if the two next justices cannot agree in the order, or shall make no order: And this case, tho' likely enough to happen, hath not yet been determined. If they will not proceed at all, there seemeth to be no doubt, but that they may be compelled by a *mandamus*; and if they cannot agree, yet still it seemeth, that they may in like manner be compelled, for till that is done, they have taken no order for the relief of the parish, which the statute requires that they shall do. But whether if one of the next justices shall refuse, and another not, the next shall or may act in such case, doth not appear to have been adjudged. —By altering the words thus, *Two or more justices in or near unto the limits*,—would remedy the defect.

Shall and may by their discretion] Here is no time limited for their proceeding in this matter; so that the order may be made at any time after the birth of the child.

And in the case of *K. and Miles, M. 1 G.* On motion to quash an order of bastardy, it was resolved, that if the father run away, and return, tho' 14 years after, yet an order to fix the child on him is good; for there is no statute of limitation in these cases. *Self. C. V. 1. 77.*

But by the aforesaid statute of the 6 *G. 2.* if the reputed father is in prison, and no order shall be made in six weeks after the birth of the child, he may in such case be discharged from his imprisonment; but the order nevertheless made upon him afterwards, will be good.

Take order] Herein they must proceed as in all other like cases, by giving the party accused an opportunity of being heard in his defence. In the case of *K. and Cotton, T. 6 & 7 G. 2.* An information was moved for against the defendant, who with another justice made an order of bastardy upon one *Fitzgerald*, without summoning him to appear before them to make his defence. Upon appeal to the sessions he was acquitted, and put to great expences; which it was insisted was contrary to natural justice. By Mr Justice *Page*; No man in an office can be supposed to be so ignorant, as not to know it is

against natural justice, to convict a man without a summons; the examination ought to be so made, that the truth may appear, and that must be by examining both sides, otherwise it is partial; the scandal, the expence, and the disorder in Mr *Fitzgerald's* family, are things that ought to be considered; here was no taking by warrant, and therefore an action of false imprisonment would not lie; and this is the only method can be used to punish the justice. Mr *J. Probyn*; The principal objection about a summons is right in law, and in reason; possibly an action on the case might be framed; there may possibly have been only an error in judgment, and it is hard to grant an information. Mr *J. Lee*; If this was strictly a conviction, against which no appeal lies, an information ought to be granted; but he thought the matter was not so very strong in the case of orders. And the rule was discharged. *Sess. C. V. 1. 179.*

E. 8 G. 2. K. v. Taylor and Neale. Motion in the king's bench for an information against the defendants, two justices of *Devonshire*, for making an order on one *Nicholas Meuld*, adjudging him to be the putative father of a bastard child, without summoning him, and also for refusing to hear his witnesses. On shewing cause, it appeared that he was summoned by a third justice, which the court held to be sufficient; but that the defendant not appearing himself, the justices would not hear his witnesses. And by the court; supposing the man was summoned, and did not appear, the justices are not then bound to hear any evidence for him; and this court will not hear any evidence in behalf of a person, who should attend here, and does not. *Sess. C. V. 2. 192.*

By charging such mother] If the mother shall marry before any order made, it hath been doubted whether the justices can then charge her, as having no effects of her own, the same by the marriage being vested in the husband. As in the case of *Ellen Bent*, *E. 5 G. 3.* She was delivered of a bastard child in the parish of *Clifton*. After which, and before any order made, she married one *Abraham Taylor* of the parish of *Middleton*. The overseers of *Clifton* apply to the justices, who made an order of filiation, charging her with 8 d. a week towards the relief of the parish. She pleaded her utter inability, and refused to pay. Upon which the justices commit her to the house of correction. She was brought up by *habeas corpus*, and her counsel moved for her discharge, insisting upon the illegality of her commitment; for that, being a married woman, she was not an object of the justices jurisdiction.

But

But it was resolved by the court, that marriage doth not exempt the mother of a bastard child from the power of the law. And she was remanded.

With the payment of money weekly, or other sustentation] That is, to the overseers for the use of such child. But whether the overseers shall have the sole application of the money, and ordering of such child, or the reputed father may take the child from the parish, and provide for it himself, hath been doubted, and seemeth not yet to have been fully settled by the unanimous resolution of the court. And there are difficulties on both sides. If the reputed father indemnifies the parish, the intention of the act seemeth to be answered; and there may be supposed something of natural affection (especially if he acknowledges the child to be his) inclining him to be regardful of the child's welfare; at least more than can be reasonably expected from parish officers. But then, to be allowed to take the child from its mother, with whom the parish officers usually and very properly leave it, whilst very young, is unnatural and cruel; and it is very rare, that the reputed father ingenuously owns himself to be the real father. But if the child is of age and ability to be an apprentice or servant, and the reputed father can find a proper master, it is fit that he should have power to put out the child accordingly, or that his contribution to the parish from that time should cease.

In the case of *Richards* and *Samon* against *Hodges*, T. 2 Cha. 2. this point came in question, but the matter went off on an error in the proceedings; which was thus: *Richards* and *Samon*, being churchwardens, brought an action against *Hodges*, on his bond in the usual form to indemnify the parish in the case of a bastard child. The defendant pleaded *Non damnificatus* generally. The plaintiffs replied, that neither the defendant nor any other, for the space of one month after the making of the bond, did provide any maintenance for the child; by reason whereof, the parishioners, to prevent the said child's perishing by hunger and cold, were forced for all the time aforesaid to pay, and have paid 4s, for the maintenance and nourishment of the said child. To which the defendant rejoined, that he would have nourished the said child at his proper costs and charges for all the time aforesaid, and offered so to do, as well to the plaintiffs, as to other the parishioners, but they refused to permit him, and of their own wrong, and against the will of the defendant, put the said child to nurse, and paid the said 4s. Upon

which rejoinder, the plaintiffs demurred in law. And by the court, the rejoinder is not good, because it is a departure from the first plea in bar; for the defendant in his plea says, that the parishioners were not damnified, and when the plaintiffs by their replication shew how they were damnified, there the defendant cannot rejoin that this damnification was of their own wrong, as here he hath done, but he ought to have pleaded that at first in his plea in bar. And tho' it was urged for the defendant, that this was no damnification at all, because it was the voluntary act of the parish to put the child to nurse, when the defendant himself offered to maintain it, and that they ought not to take advantage of their own wrong; yet it was not allowed: For the court held clearly, that the rejoinder was a departure; and for that reason, it was adjudged for the plaintiffs. 2 *Saunders* 83.

M. 21 Cha. 2. Burwell's case. Two justices order the reputed father to pay so much a week to the parish, until the child should be 12 years of age. This was held by the court to be wrong; and the reason given was, because the father might take it away when he pleased; and therefore the order ought to have been, that he should pay so long as the child should be chargeable to the parish. 1 *Ventr.* 48.

E. 24 Cha. 2. Sherman's case. An order was made, that the father should pay so much a week, till the child should be able to get its living by working. It was said by *Twissden* this order could not be good; for perhaps the father would take it away and maintain it himself, which he may do if he pleaseth. 1 *Ventr.* 210.

E. 11 An. Q. and Smith. Order to pay 1s. a week, till the child is 8 years old. It was objected, that it should be so long as the child is chargeable: possibly he may gain a settlement; or a person may give him an estate; or the father may take him. By the court: This is only a remote possibility. As to the father's taking him, he ought to have done it at first; and by suffering the order to be made, it shall be deemed a refusal in law; besides, he shall not then be suffered; he may sell him, or make away with him, as too often happens. *Caf. of S.* 64.

T. 27 G. 2. Newland and Osman. Debt upon a bond, with a condition to indemnify and save harmless the parish of *Eling* from a bastard child. Plea; that the defendant had maintained, supported, and nourished the said child to a certain day, that is to say, to the 27th of October last, and that then he offered to take the said child

to maintain, which they refused, and that if the church-wardens or any of them have been damnified, it is of their own wrong. Replication; that for 3 weeks from and after the said 27th day of October, the defendant did not provide nourishment for the child, but failed, and by reason thereof the plaintiffs, after the three weeks, expended 3s. for the maintenance of the child, and so were damnified. Demurrer; and joinder in demurrer. The question of law is, Whether a putative father may take a bastard child into his own custody to maintain it, or whether the parish shall have the care of it. And the case in 2 *Saund.* 83. was mentioned, wherein the court held this to be a good plea. 1 *Ventr.* 48. that the father may maintain the child himself. 1 *Ventr.* 210. that the justices can only make an order to maintain, so long as the child shall be chargeable.—By *Lee Ch. J.* The right way is, to make the order, so long as the child shall be chargeable. It is not to be limited to any certain time. And the reason given in all these cases is, that the father or mother may take it before the time. The intention of the statute of Elizabeth was, to have a provision for the bastard, and at the same time to indemnify parishes. And the law could never think of taking the care and education of children from their parents. Nor could this enter into the mind of any judge. Nourishing and maintaining certainly answers education. It hath been objected, that the excuse is collateral: I do not think so; for all the inhabitants are parties, and the overseers are but trustees for them. It seems a sufficient excuse; and there is no answer on the part of the plaintiff to it. No objection has ever been thought of to pleas of this kind. —*Wright J.* in the case in *Saunders*, it seems to have been admitted, that if this had been pleaded in the first instance, it would have been good. I never did hear before, that the care of the child devolved upon the parish, where there was any other person to take care of it. They are obliged to maintain the child, where it is in danger of starving. This court has constantly held, that the father has a right to take it away, by quashing the orders made in manner abovementioned. This is not a collateral excuse; but such an one as will save the penalty. And I cannot see that the parish has any sort of right or interest in the child.—*Dennis J.* The material objection taken to this plea is, Whether or no the putative father of a bastard child can by the law of England take his bastard child from the parish. I never did hear this doubted before. And I think that the notion that he cannot, is not to be countenanced nor encouraged.

The law does not suppose, that a man will not maintain his own child. It is said, the next heir is not to be trusted with the guardianship. I am sorry that was ever introduced into the law of England. It is an injurious notion of the people of England. I will rather suppose, that the parish officers will be cruel to the child, than the father. All the cases admit tacitly that the father hath such a power. And some of them say so expressly. And I am very well satisfied that the law is so. Inhabitants, churchwardens, overseers, are all the same; and every part of the condition is answered. I have known this plea very often pleaded. And that case in *Saunders* is the rule.—*Foster* J. I am not so clear in these points. I think the care of educating bastard children, is not to be considered as a burden on the parish, but as a trust; and that it should not be so easy for fathers to take them out of their care and custody. The statute is express, that the justices shall order the father to contribute to the parish for the maintenance of the child. Tho' it is not to be supposed that fathers will destroy their bastard children, yet they may look upon them as a burden and a shame, and therefore either neglect them, or put them into improper hands. The resolutions and orders of justices of the peace have been grounded upon this; not for requiring security till the child came to a certain age, but because the order intended the age too far. Therefore I am not so clear. The case in *Saunders* was only his own opinion.—Judgment for the defendant, unless desired to be argued again this term. (This was at the desire of the plaintiff's counsel.)

Such party so making default in not performing the said order, to be committed] Until default shall be made, the justices have no power to commit, or to require sureties for performance of the order, or for appearing at the sessions. *L. Raym.* 858. 3 *Salk.* 66. 1 *Barnardist.* 261.

And hereby a passage might be left open to avoid the future payments, by the reputed father complying at present, and afterwards running away. But the aforesaid statute of the 6 G. 2. c. 31. seemeth to have been intended to remedy this inconvenience; by which, one or more justices, either before or after the birth, may commit him to the gaol or house of correction, unless he shall give security to indemnify the parish, or otherwise enter into recognizance to abide such order or orders as shall be made in pursuance of the act of the 18 *Eliz.*

To be committed to ward to the common gaol] In the afore-said case of *Ellen Bent*, the justices had committed her to the house of correction. It was objected, that the statute gives no power to do this; but the commitment, if any, ought to have been to the common gaol. But this was held by the court to be well enough. For the statute of the 7 *J. c.* 4. gives power to commit such lewd woman to the house of correction. And by the 6 *G. c.* 19. a general power is given, for small offences, or for want of sureties, to commit either to the gaol or house of correction.

Except he shall put in sufficient surety to perform the said order] That is, by recognizance; which, if the order is disobeyed, shall be forfeited, and estreated into the exchequer. But this makes nothing for the relief of the parish. And therefore it were better if such recognizance, or other security, upon default, might be made assignable to the parish officers; or else, that the person not paying, as well as not giving security, might be committed till payment should be made. Or if no security is given, it seemeth that the person disobeying the order may be indicted, fined, and imprisoned for the contempt.

It frequently happens, that the reputed father, by giving bond to indemnify the parish, escapes paying any thing towards the maintenance of the child, unless the mother, with her child, will throw her self upon the parish, which sometimes perhaps her ability will nor permit, or otherwise she disdains to do. In such case it hath been practised sometimes, for the woman's father to bring an action against the man for 'special damage sustained by the loss of his daughter's service'; And a jury, according to circumstances, will give reasonable compensation.

Or else personally to appear] *H. 8 W. K.* and *Matthews*. The court will not quash an order of bastardy, unless the reputed father be present in court. 2 *Salk.* 475.

And the reason is, that if the cause shall go against him, he may be proceeded against, in case of contempt or disobedience.

Next general sessions] That is to say, the next general sessions after notice of such order. 3 *Keb.* 551.

General sessions] *T. 10 W. K.* and *Shaw*. An order was made by two justices, adjudging *Shaw* to be the reputed father of a bastard; whereupon he appealed to the next

quarter sessions after notice; where the order of the two justices was discharged: And now it was moved to quash the order of sessions, because by the statute the appeal must be to the next *general* sessions, and there might have been a general sessions before the general quarter sessions, as in *London* and *Middlesex*, where there are four general sessions in the year, besides the quarter sessions. And quashed for this fault. 2. *Salk.* 482.

To be holden in that county] It was moved to quash an order, for that it was at the sessions of the peace in the county aforesaid, and did not say *for* the county; but this was over-ruled, for that there is not so much strictness required in orders, as there is in indictments. 1 *Ventr.* 37.

To which may be added also, that this is according to the words of the statute.

In that county where such order shall be taken] *T.* 15 *Cha.* 2. *K.* and *Coystan.* Resolved, that this shall be intended of the next sessions of that part of the county, where it was made, and not at the next sessions in the county at large; for that would be mischievous in many counties, where there are several sessions in distinct parts of the county. 1 *Sid.* 149.

To abide such order as the said justices, or the more part of them, shall then and there take] *M.* 13 *G.* *K.* and *Tenant.* The order of two justices being quashed upon the merits by the sessions on an appeal, the defendant is thereby legally acquitted, and cannot be drawn in question again for the same fact. *L. Raym.* 1423, 4. *Str.* 716.

But the order quashed for want of form, is as no order at all; and therefore the two justices may proceed *de novo*.

If the two next justices make an order, and the party appeals to the next sessions, and they alter, or discharge (upon the merits), or confirm that order; no other sessions can order any thing contrary thereto, for the order upon the appeal is final. *Cro. Car.* 341, 350. *Pridgeon's* case.

T. 1 *G.* 2. *K.* and *Arundell.* Two justices make an order, that the defendant shall pay a sum in grofs, and also 2s. a week so long as the child shall be chargeable. The party appeals to the sessions, who confirm the order. At a subsequent sessions, the father of the bastard desired to have the keeping of it, and that the payment of the

2s. a week should cease ; which the second sessions ordered. Motion was made to quash this last order of sessions, because in this case they had no jurisdiction. And the court held, that the second sessions had no authority to order the subtraction of the 2s. a week ; and the order was quashed, because it was made out of time (being 3 years after the appeal), and therefore the justices had no jurisdiction. *Seff. C. V. 1. 234.*

3 Car. c. 4. *All justices of the peace within their several limits and precincts, and in their several sessions, may do and execute all things concerning the statute of 18 El. that by the justices in their several counties are by the said statute limited to be done*] This clause in the statute of the 3 Car. c. 4. seemeth to have been generally misunderstood. The adjudications all along (*Cosmyn's Dig. Bastard. G. 2. 1 Salk. 122. L. Raym. 1157.*) have supposed, that hereby a power is given to the justices in sessions to proceed originally in the case of bastardy ; which would deprive the party of the benefit of an appeal, unless we could suppose an appeal from one sessions to another, that is, from the same court to the same court, which is absurd. The clear solution of the matter seems to be this : The statute of the 18 El. c. 3. was only explanatory of, and supplementary to, the 14 El. c. 5. which statutes taken together did enact (amongst other) these four things ; 1. That the justices within the several counties, and also the justices within cities, boroughs, and towns corporate, within their respective limits, shall take order by a weekly taxation of all and every the inhabitants for relief of the poor. 2. That in case of the several parishes, with respect to bastard children, two justices in or next unto the limits where the parish church is, within which parish such bastard shall be born, shall take order for the keeping such bastard child, by charging the mother or reputed father, with payment of money weekly, or other sustentation for the relief of such child. 3. That if any person is aggrieved with any such taxation, he may appeal to the next general sessions to be holden within the shire. 4. With a proviso, that the county justices shall not intrude, or enter into any city, borough, or town corporate, having justices of its own, for the execution hereof, for any matter or cause arising within the precincts of such city, borough, or town corporate ; but the justices there shall proceed, as the justices elsewhere may do within the respective counties.——Now both the said statutes were suffered to expire, except only so much as is contained

tained in the second particular abovementioned, rendering the mother and reputed father of bastard children liable to maintain them, which is yet in force, therefore the clause of appealing, and the power of justices in corporations, was gone. Upon which account, this statute of the 3 Car. c. 4. which continued the aforesaid second clause concerning bastard children, supplied the omission, by enacting, that *all justices of the peace within their several limits and precincts, and in their several sessions, may do and execute all things concerning that part of the statute of the 18 El. c. 3. which concerneth bastards begotten and born out of lawful matrimony, that by justices in the several counties are by the said statute limited to be done.*—So that the power of proceeding originally in the sessions cannot hereby be supported; but the justices, whether of the counties at large, or of towns corporate or other franchises, out of their sessions, are to charge the mother and reputed father; and if any person is aggrieved, he may appeal to the sessions: just in the same manner, as if the aforesaid four clauses were all still in force.

IV. Punishment of the mother and reputed father.

By the 18 El. c. 3. *Concerning bastards being left to be kept at the charges of the parish where born, to the great burden thereof, and to the evil example and encouragement of lewd life, it is enacted, that the two next justices shall take order therein, as well for the punishment of the mother and reputed father, as for the relief of the parish.*

And by 7 J. c. 4. *Every lewd woman which shall have any bastard which may be chargeable to the parish, the justices of the peace shall commit such lewd woman to the house of correction, there to be punished and set on work, during the term of one whole year; and if he shall afterwards offend again, then to be committed to the said house of correction as aforesaid, and there to remain until she can put in good sureties for her good behaviour, not to offend so again.* s. 7.

[*Bastard which may be chargeable*] It seemeth by these words, that such a woman shall not be sent to the house of correction, until after the child be born, and that it be living; for it must be such a child as may be chargeable to the parish. *Dalt. c. 11.*

And if she will discharge the parish of keeping the bastard, she cannot be punished by this statute of 7 J.

But nevertheless she may be punished (Lord Coke says) by the statute of 18 El. 2 Inst. 733.

Which

Which opinion seems justly questionable: for the preamble of the said act of 18 *El.* (as hath been rehearsed) seemeth to restrain the jurisdiction of the justices to the parents of such bastard children only as are *left to be kept at the charges of the parish where born.*

The justices of the peace shall commit] It seemeth that such commitment ought to be by two justices at the least; and by comparing the two statutes together, it seemeth fittest for the two next justices authorized by the 18 *El.* *Dalt. c. 11.*

Shall commit such lewd woman] But such punishment shall not be, until after the woman is delivered of her child; neither are the justices to meddle with the woman, until the child be born, and she strong again. *Dalt. c. 11.*

Also it seemeth, that such bastard child is not to be sent with the mother to the house of correction, but rather that the child should remain in the town where it was born (or settled with the mother) and there to be relieved by the work of the mother, or by relief from the reputed father; and yet the common opinion and practice is otherwise, *viz.* to send the child with the mother to the house of correction; and this may also seem reasonable, where the child sucketh on the mother. *Dalt. c. 11.*

But it seemeth much the best, to commit the mother only, and not the child, but leave it to her choice whether she will take it with her; and if she will not, then to send it to its lawful place of settlement.

Then to be committed to the said house of correction as aforesaid] Which words do imply that she shall not be punished as for a second offence, unless she hath been committed and punished in the house of correction for the first.

V. Mother or reputed father running away.

Whereas the putative fathers and lewd mothers of bastard children run away out of the parish and sometimes out of the county, and leave the bastard children upon the charge of the parish where they are born, altho' they have estates sufficient to discharge the parish; it shall be lawful for the churchwardens and overseers for the poor of such parish where any bastard child shall be born, to take and seize so much of the goods, and receive so much of the annual rents of the lands of such putative father or lewd mother, as shall be ordered by any two justices, towards the discharge of the parish, to be confirmed at the sessions, for the bringing up and providing for such bastard child;
and

and thereupon the sessions may make an order for the churchwardens or overseers for the poor of such parish, to dispose of the goods by sale or otherwise, or so much of them for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits of the lands, or so much of them as shall be so ordered by the sessions. 13 & 14 C. 2. c. 12. s. 19.

E. 2 Ann. 2. and Chaffey. Order to the churchwardens and overseers, to seize of the putative father's goods, what they should judge proper for securing of the parish, quashed; for that it should be, what the justices think proper, and not what the churchwardens and overseers think proper. *L. Raym.* 858.

VI. Murdering a bastard child.

Concealing the death of a bastard child.

1. By the 21 J. c. 27. *If any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other ways, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, she shall suffer death as in case of murder, except she can prove by one witness at the least, that the child was born dead.*

† And it hath been adjudged, that in order to convict a woman by force of this statute, there is no need that the indictment be drawn specially, or conclude against the form of the statute; for the statute doth not make a new offence, but only make such concealment an undeniable evidence of murder. 2 *Haw.* 438.

Also, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother. 2 *Haw.* 438.

But it hath been adjudged, that where a woman lay in a chamber by her self, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 *Haw.* 438.

Also, it hath been agreed, that if a woman confess herself with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the

the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. 2 *Haw.* 438.

2. If a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother, it is murder. 1 *H. H.* 429, 30.

Giving a potion to cause abortion.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, tho' it be a great crime, yet it is not murder nor manslaughter by the law of *England*, because it is not yet in *rerum natura*, nor can it legally be known, whether it were killed or not: So it is, if after such child were born alive, and after die of the stroke given to the mother, this is not homicide. 1 *H. H.* 433.

But if a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessory. 1 *H. H.* 433.

VII. Capacity of a bastard child as to inheritance.

A bastard can have no name of reputation as soon as he is born; but after he is born, and hath gained by time a name by reputation, he may purchase by his reputed name, to him and to his heirs; tho' he can have no heirs but of his body. 1 *Inst.* 3. 6 *Co.* 65.

A bastard is *terminus a quo*; he is the first of his family, for he hath no relation of which the law takes any notice; but this must be understood as to civil purposes, for there is a relation as to moral purposes, therefore he cannot marry his own mother, or sister, or the like. 3 *Salk.* 66.

Consideration of natural affection will not raise an use to a bastard; for tho' there is natural affection between them, yet the raising the use is a constitution of the law, and therefore the use shall never arise. *Jenk.* 47. *Dyer* 374.

If the issue of a man who is a bastard purchase land, and dies without issue; tho' the land cannot descend to any heir on the part of the father, yet to the heir on the part

part of the mother (being no bastard) it may; so if the bastard was attainted: for the heirs of the part of the mother make not any conveyance by the bastard. *Noy* 159.

A. Voluntary examination of a woman with child of a bastard; by 6 G. 2. c. 31.

Westmorland. **T**HE voluntary examination of A. M. of ——— in the said county, singlewoman, taken on oath, before me ——— one of his majesty's justices of the peace in and for the said county, this ——— day of ———.

Who saith, that she is now with child, and that the said child is likely to be born a bastard, and to be chargeable to the parish of ——— in the said county, and that A. F. of ——— in the said county, weaver, is the father of the said child.

Taken and signed the day and year
abovewritten, before me

The mark of
† A. M.

Ʒ. P.

Examination after the birth.

Westmorland. **T**HE examination of A. M. of ——— in the said county, singlewoman, taken upon oath before me ——— one of his majesty's justices of the peace in and for the said county, this ——— day of ———.

Who saith, that on ——— the ——— day of ——— now last past, at ——— in the parish of ——— in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of ———; and that A. F. of ——— in the said county, weaver, did get her with child of the said bastard child.

Taken and signed the day and year
abovewritten, before me

The mark of
† A. M.

Ʒ. P.

B. Warrant

B. Warrant for apprehending the reputed father before the birth; on 6 G. 2. c. 31.

Westmorland. { To the constable of——

WHEREAS A. M. of——in the said county, singlewoman, hath by her voluntary examination taken in writing upon oath, before me——one of his majesty's justices of the peace in and for the said county, this present day declared herself to be with child, and that the said child is likely to be born a bastard, and to be chargeable to the parish of——in the said county, and that A. F. of——in the said county, weaver, is the father of the said child; And whereas O. P. one of the overseers of the poor of the parish of——aforesaid, in order to indemnify the said parish in the premisses, hath applied to me to issue out my warrant for the apprehending of the said A. F. I do therefore hereby command you, immediately to apprehend the said A. F. and to bring him before me or some other of his majesty's justices of the peace for the said county, to find security to indemnify the said parish of——or else to find sufficient surety for his appearance at the next general quarter sessions, [or, next general sessions] of the peace to be holden for the said county, and to abide and perform such order or orders as shall be made, in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen Elisabeth, concerning bastards begotten and born out of lawful matrimony. Given under my hand and seal the——day of, &c.

The like after the birth.

Westmorland. { To the constable of——

WHEREAS A. M. of——in the said county, singlewoman, hath by her examination taken in writing upon oath, before me——one of his majesty's justices of the peace in and for the said county, declared, that on the——day of——now last past, at——in the parish of——in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of——and hath charged A. F. of——in the said county, weaver, with having gotten her with child of the said bastard child; And

whereas O. P. one of the overseers of the poor [and so on as in the foregoing precedent to the end.]

C. Commitment thereupon; by the 6 G. 2. c. 31.

Westmorland. { To the constable of———in the said county, and to the keeper of the house of correction [or, common gaol] at —— in the said county.

WHEREAS A. M. of———singlewoman, in her voluntary examination taken in writing and upon oath, the———day of———now last past, before me———one of his majesty's justices of the peace in and for the said county, hath declared herself to be with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of———and hath charged A. F. of———gentleman, with having gotten her with child of the said child; [Or, if it is after the birth, then say, *Whereas A. M. of———singlewoman, in her examination taken in writing upon oath, before me———one of his majesty's justices of the peace in and for the said county, hath declared, that on the———day of———now last past, at———in the parish of———in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of———and hath charged A. F. of———weaver, with having gotten her with child of the said bastard child*]; And whereas the said A. F. being now personally present before me, being brought by my warrant, upon application for that purpose to me made, by O. P. one of the overseers of the poor of the said parish, hath refused to give security to indemnify the said parish, and hath also refused to enter into a recognizance with sufficient surety, upon condition to appear at the next general quarter sessions [or, next general sessions] of the peace to be holden for the said county, and to abide and perform such order or orders as shall be made in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony: These are therefore to command you the said constable, to take and convey the said A. F. to the house of correction at———in the said county, and to deliver him to the keeper thereof, together with this warrant. And I do hereby command you the said keeper of the said house of correction, to receive the said A. F. into your custody in the said house of correction, and him there safely to keep, until he shall give such security, or enter into such recognizance as aforesaid, or be otherwise lawfully

lawfully delivered from thence. Given under my hand and seal the——day of, &c.

D. Bond to indemnify the parish.

K NOW all men by these presents, that we A. F. of —— in the county of —— gentleman, and A. S. of —— yeoman, are held and firmly bound unto —— churchwardens, and —— overseers of the poor of the parish of —— in the said county (in trust for the parishioners of the said parish) in —— pounds of good and lawful money of Great Britain, to be paid to the said —— or their certain attorney, their executors, administrators, or assigns: To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each and every of our heirs, executors, and administrators, firmly by these presents; Sealed with our seals, and dated the —— day of —— in the —— year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, and in the year of our lord ——.

The condition of this obligation is such, that whereas A. M. of —— singlewoman, hath in and by her voluntary examination, taken in writing and upon oath, before —— one of his majesty's justices of the peace in and for the said county of —— declared that she is with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of —— and that the abovebounden A. F. is the father of the said child; [If it is after the birth, then say, that whereas A. M. of —— singlewoman, in her examination taken in writing upon oath, before —— one of his majesty's justices of the peace in and for the said county, hath declared, that on the —— day of —— now last past, at —— in the parish of —— in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of —— and hath charged the abovebound A. F. with having gotten her with child of the said bastard child,] If therefore the said A. F. and A. S. or either of them, their or either of their heirs, executors, or administrators, do and shall from time to time, and at all times hereafter, fully and clearly indemnify and save harmless, as well the abovenamed churchwardens and overseers of the poor of the said parish of —— and their successors for the time being, as also all and singular the other parishioners and inhabitants of the said parish of —— which now are, or hereafter shall be for the time being, of and from all manner of costs, damages, charges, expen-

Bastards.

ments, and charges whatsoever, for or by reason of the birth, education, and maintenance of the said child, and of and from all actions, suits, troubles and other charges and demands whatsoever, touching or concerning the same, that then this present obligation to be void, otherwise of force.

Signed, sealed, and delivered (having been
first duly stamped) in the presence of

A. F.
A. S.
A. W.
B. W.

E. Condition of a recognizance for the reputed father to appear at the sessions, and to abide such order as shall be made; on 6 G. 2. c. 31.

WHEREAS A. M. of———singlewoman, hath in and by her voluntary examination, taken in writing and upon oath, before———one of his majesty's justices of the peace in and for the said county of———declared that she is with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of———and that the abovebounden A. F. is the father of the said child; [If it is after the birth, then say, *Whereas* A. M. of———singlewoman, in and by her examination taken in writing upon oath, before———one of his majesty's justices of the peace in and for the said county, hath declared that on the———day of———now last past, at———in the parish of———in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of———and hath charged the abovebound A. F. with having gotten her with child of the said bastard child:] The condition of this recognizance is such, that if the abovebound A. F. do and shall appear at the next general quarter sessions [or, the next general sessions] of the peace to be holden for the said county, and shall abide and perform such order or orders as shall be made in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony,——Then this recognizance to be void, otherwise of force.

F. Warrant

F. Warrant of the two next justices, for the mother, with a summons for the reputed father, to make the order of filiation and maintenance; on the 18 *El. c. 3.*

Westmorland. { To the constable of——

WHEREAS information hath been made unto us——
two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, and both of us residing next unto the limits of the parish church within the parish of——in the said county, as well upon the complaint of the churchwardens and overseers of the poor of the said parish, as on the oath of A. M. of——singlewoman, that on the——day of——last past, she the said A. M. was delivered of a (male) bastard child at——in the said parish, and that A. F. of——in the said county, taylor, is the father of the said bastard child, and that the said bastard child is now living, and chargeable [or, likely to become chargeable] to the said parish of——These are therefore to command you to bring the said A. M. before us, at the house of——in——in the said county, on——the——day of——at the hour of——in the afternoon of the same day, to be by us farther examined, touching the premises; And that you give notice thereof, unto the said A. F. that he may likewise be at the time and place aforesaid, to make his lawful defence: To the end that upon the examination of the cause and circumstance, we may take such order therein, as to right doth appertain. And what you shall do in the execution hereof, you are to make known unto us at the time and place aforesaid. Given under our hands and seals the——day of, &c.

G. Order of filiation and maintenance.

Westmorland. **T**HE order of J. P. and K. P. esquires, two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, and both residing [in, or] next unto the limits of the parish church within the parish of——in the said county, made the——day of——in the——year——concerning a (male) bastard child, lately born in the parish of——aforesaid, of the body of A. M. single woman:

Whereas it hath appeared unto us the said justices, as well upon the complaint of the churchwardens and overseers of the

poor of the said parish of———as upon the oath of the said A. M. that she the said A. M. on the———day of———now last past, was delivered of a (male) bastard child at———in the said parish of———in the said county, and that the said bastard child is now chargeable to the said parish of———and likely so to continue; and further, that A. F. of———in the said county, yeoman, did beget the said bastard child on the body of her the said A. M. And whereas the said A. F. hath appeared before us, in pursuance of our summons for that purpose, but hath not shewed any sufficient cause why he the said A. F. shall not be the reputed father of the said bastard child: [Or, And whereas it hath been duly proved to us upon oath, that the said A. F. hath been duly summoned to appear before us the said justices, to the end we might examine into the cause and circumstance of the premisses; and whereas he the said A. F. hath neglected to appear before us, according to such summons:] We therefore upon examination of the cause and circumstance of the premisses, as well upon the oath of the said A. M. as otherwise, do hereby adjudge him the said A. F. to be the reputed father of the said bastard child.

And thereupon we do order, as well for the better relief of the said parish of———as for the sustentation and relief of the said bastard child, that the said A. F. shall and do forthwith, upon notice of this our order, pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of———or to some or one of them, the sum of———for and towards the lying-in of the said A. M. and the maintenance of the said bastard child, to the time of making this our order.

And we do also hereby further order, that the said A. F. shall likewise pay or cause to be paid, to the churchwardens and overseers of the poor of the said parish of———for the time being, or to some or one of them, the sum of———weekly and every week from this present time, for and towards the keeping, sustentation, and maintenance of the said bastard child, for and during so long time, as the said bastard child shall be chargeable to the said parish of———.

And we do further order, that the said A. M. shall also pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of———for the time being, or to some or one of them, the sum of———weekly and every week, so long as the said bastard child shall be chargeable to the said parish of———in case she shall not nurse and take care of the said child herself.

Given under our hands and seals the day and year first above written.

One whereof is of the quorum] Many orders formerly have been quashed, for want of setting forth that one of the justices was of the *quorum*; but now by the statute of 26 G. 2. c. 27. no order shall be quashed for that defect only.

Whereas it hath appeared unto us] *K. and Beard.* The examination of the woman must be by two justices, as well as the ordering part; for the examination is a judicial act, and ought to be by both; and it is not enough that one should examine, and make report to the other; but if they are both present, and one only examine, it is well enough, for it is in fact the examination of both. 2 *Salk.* 478.

As well upon the complaint of the churchwardens and overseers] It hath been said that an order made without the complaint of the parish officers, is not good. *Black.* 44.

But in the case of *K. and Buckall*, *M.* 3 G. 2. where it was objected, that the order did not appear to be made upon complaint of the parish; it was answered, that the statute does not require that the parish should complain, but gives the justices power to make such order on the complaint of any other. And the order, as to that part, was confirmed. 1 *Barnardist.* 261.

As upon the oath of the said A. M.] It seemeth, that the mother may be examined upon oath, concerning the reputed father, and of the time and other circumstances; for that in this case, the matter, and the trial thereof, dependeth chiefly upon the examination and testimony of the mother. *Dalt. c.* 11.

Was delivered of a (male) bastard child] *H.* 8 G. *K. and England.* An order was quashed, because the sex of the bastard, or the name of it were not mentioned; only, a certain bastard child born of the body of such a woman. *Str.* 503.

At—in the said parish of—] *M.* 11 *Ann.* 2. and *Cash.* The order did not set forth that the child was born in the parish; and by the statute the justices cannot make an order to compel a man to contribute towards the maintenance of a bastard child, but in case of that parish where the child was born: And quashed for this reason. *Cas. of S.* 59.

T. 7 G. *K. and Butcher.* Exception was taken to an order of bastardy, that it did not appear the child was born in the parish to which the relief is ordered; for it

ran, *We two justices of the borough of Lime Regis, residing within the limits where the parish church is, within which parish the child was born*——Which is only an averment, that the justices resided in that parish where the child was born, but that might not be the same parish ordered to be relieved. And for this fault the order was quashed. *Str.* 437.

E. 3 G. 2. K. and Childers. On a rule to shew cause, why an order of two justices for relief of a bastard child, and an order of sessions confirming the same, should not be quashed; it was objected, that it was not directly adjudged that the child was born in the parish (of *Staplehurst*), and yet the order requires the defendant to pay the sum of 45 s. to the churchwardens of that parish to reimburse them. It was answered, that it doth sufficiently appear in the order, that the child was born there; for it adjudges, that the defendant should pay this sum, for the charges the parish of *Staplehurst* were at upon account of the woman's lying in there. But the court said, that they do not allow of inferences to give the justices jurisdiction; and accordingly quashed both the orders. *1 Barnardist.* 326.

E. 10 G. 2. K. and Greaves. The parish where the child is born, is only to be indemnified; and if the bastard has acquired a settlement elsewhere, the father is then discharged. *Nelf. Bast.*

And upon this head it is observable, that there is one case, which altho' it frequently happeneth, yet is not within the statute; and that is, where a bastard is born in a parish where the mother hath no settlement. The child shall go with its mother for nurture, whilst it is a nurse child, to her place of settlement; and such place can have no remedy upon this statute, for that the child was not born there. And it seemeth that the parish, where it was born, shall not be liable to maintain it, until the child shall be lawfully removed thither, as to its place of settlement.

Upon which ground also, it seemeth not safe, to grant a certificate with a woman with child of a bastard, thereby indemnifying the parish where it shall be born, and promising to receive and provide for the bastard child when it shall become chargeable. For the parish granting such certificate, can have no remedy against the mother or reputed father, but only the parish where the child was born; nor can that parish neither, because it is indemnified.

Chargeable to the said parish] Order to provide for a bastard child: Exception was taken, that the order doth not set forth that he is chargeable to the parish, or likely to be so. And quashed by the court. *Comb.* 39.

But in *K. and Matthews, H. 8 W.* Exception was taken, that the order doth not set forth that the child is likely to become chargeable: But this exception was overruled; for that it is self-evident, that every bastard child is likely to become chargeable. *2 Salk.* 475, 6.

And further, that A. F. of—in the said county, yeoman, did beget the said bastard child] *T. 2 G. 2. K. and Browne.* Upon an order of bastardy it was stated, that the husband had been absent six years, and that during his absence the defendant *had carnal knowledge* of the wife, and therefore they adjudge him to be the putative father. But by the court, This order must be quashed; for his lying with her is not a sufficient reason to infer him the father of this child: and though the justices need not shew the grounds they go upon, yet if they do, and it appears no sufficient ground, their order will be bad. *Str.* 811.

Summons] If the order do not set forth, that the defendant was duly summoned to appear, and for what cause, it ought to be quashed. *K. and Glegg.* 10 *Mod.* 4.

Do hereby adjudge] *T. 4 Ann. Q. and Weston.* The great objection which stuck long with the court, was, that it was said in the order, we the said justices *doth* adjudge, instead of *do* adjudge; and after the case had depended two terms, and been several times stirred, the court for that exception, the last day of the term, quashed the order. *L. Raym.* 1198.

And afterwards, *H. 4 Ann.* The same justices made another order, with the very same fault in it, *viz. doth* adjudge; and upon a certiorari, that was quashed. *L. Raym.* 1198.

Adjudge the said A. F. to be the reputed father] *E. 20 G. 2. K. and Perkassé.* An order was quashed, because, there was no adjudication, that the person against whom the complaint was made, was the reputed father. *2 Sid.* 363.

H. 9 G. 2. K. and Jenkins. Motion to quash an order of two justices, whereby they adjudge, that such a person is *not* the putative father of a bastard child, and therefore they discharge him; and the rather, because in such a case the parish cannot appeal, because an appeal is only, when the party refuses to give security to come to sessions.

And

Bastards.

And by the whole court, the two justices have no such authority: for their whole power depends on the statute of 18 *Eliz.* and that is only to take order for punishment of the parties, and for relief of the parish; and this order is for neither the one nor the other. *Sess. C. V. 2. 161. Sir. 1050.*

The sum of—---for and towards the lying-in] *M. 12 Ann. Q. and Odam.* Order for maintenance of a bastard child, was excepted to, because the defendant is upon sight of the order to pay 9*l.* in gross; and after that, so much weekly. And by the court; By the statute the justices are to take order for relief of the parish, and keeping of the child, by payment of money weekly, or other sustentation; and this may be only indemnifying the parish for money laid out before the reputed father was found. *1 Salk. 124.*

The sum of—weekly] *E. 20 C. 2. K. and Percaffé.* It was moved in the court of king's bench, to quash an order for maintaining a bastard child made at the quarter sessions, and the exception was, because it was unreasonable, in respect of the smallness of the sum; namely, but 2*d.* a week for the maintenance of the child: And the court were of opinion that it should be quashed, unless cause shewn; and they said, that altho' none but the justices could declare the father, yet if they were unreasonable in the sum, the court might judge of that. *2 Sid. 363.*

Note, this case proceeds on the aforesaid supposition of the power of the sessions to make an original order. If the justices make such order for the reputed father to pay such a small sum, the sessions on appeal undoubtedly may alter it. And that seemeth the regular course. Whether the court of king's bench will unravel the cause upon the merits, may be a question. There may be circumstances, before the justices, of alleviation; as where the justices, tho' they cannot regularly refuse the woman's oath concerning the reputed father, yet may have reason to suspect that passion or resentment have some influence with her, or that she cannot perhaps certainly know who is the father of the child. In such case, the justices may think fit not to overload the person against whom she swears; tho' not perhaps to charge so ridiculous a sum (if they charge any thing) as 2*d.* a week.

During so long time as the said bastard child shall be chargeable] *E. 9 W. K. and Barebaker.* An order to pay
10

so much money by the week, till the child shall be fourteen years of age, was adjudged to be bad: for the justices have no power but to indemnify the parish; and that is only to oblige him to maintain the child, as long as it is or may be chargeable. *1 Salk. 121. 2 Salk. 478.*

An order that the putative father should pay so much a week, until it should be able to get its living by working, was quashed; it should have been for so long time, as the child shall be chargeable to the parish. *1 Vent. 210.*

But in the case of *K. and Street. M. 1 G. 2.* An order of bastardy was made, to pay so much weekly, till the child was nine years old, if it should so long live. And by the court, It is a good order, for we cannot intend it able to provide for it self sooner. *Str. 788.*

So in the case of *K. and Buckall, M. 3 G. 2.* Exception was taken, that the order appointed the sum of 2s. to be paid weekly, till the child should come to the age of twelve years, without saying, if the child shall be so long chargeable to the parish. It was answered, that indeed the old authorities lay it down in general, that orders of bastardy, as well as other orders relating to the poor, must be under the limitation mentioned; but the later authorities have been, that orders of bastardy need not: and this, it was said, is founded upon good reason; for there cannot be any reasonable intendment, that bastards, who have no kindred, will have provision from any body, till such an age as is mentioned in the order. And of that opinion was the court, and confirmed the order as to that point. *1 Barnardist. 261.*

But then the child may be bound an apprentice into another parish before that age; and having gained a settlement in such other parish, the effect of the order should then cease. Therefore it is best in this and all such like cases to hold to the statute: and the statute here only gives power to the justices *to take order for the relief of the parish where the child shall be born.*

In *Browne's case, T. 9 W.* it was said, the justices cannot order a sum, for putting out the child an apprentice. *Comb. 448.*

But in the aforesaid case of *K. and Buckall, M. 3 G. 2.* Where it was objected, that the order was for the reputed father to pay 4l. to the overseers for binding the child out apprentice, when it shall come to the age of 12 years; and did not say, if the child shall want it; so that tho' the child should be provided for in any other way, the
sum

sum must be still paid to the overseers: The objection was over-ruled by the court; and the order, as to that, held good. 1 *Barnardist*. 261.

But it seemeth not necessary to incumber the order therewith; for it may be the same thing if the parish bind him out, and pay the money; for until such sum shall be run off by the weekly payments, so long the child continues chargeable.

BUT after all, so far as these errors above rehearsed shall affect only the form of the order, and not the merits thereof; the same may be amended at the sessions, by the 5 G. 2. c. 19. before the appeal shall be proceeded upon, and then the court shall go upon the merits.

H. Condition of a recognizance to appear at the sessions, after the order not performed; on the 18 *El. c. 3*.

WHEREAS by an order under the hands and seals of us ——— two of his majesty's justices of the peace for the said county, one whereof is of the quorum, and both of us residing [in, or] next unto the limits of the parish church within the parish of ——— in the said county, A. F. of ——— in the said county, taylor, is adjudged to be the reputed father of a bastard child born lately of the body of A. M. of ——— singlewoman, at ——— in the said parish of ——— [And then set forth what was ordered therein further] And whereas the said A. F. hath not observed nor performed the said order:

The condition therefore of this recognizance is such, that if the abovesaid A. F. shall observe and perform the said order, or shall personally appear at the next general sessions of the peace, to be holden in and for the said county, and shall then and there abide such order as shall be then made by the court, concerning the said bastard child, if any such order shall be then made; and if no such order shall be then made or taken by the said court, if the said A. F. do and shall perform the order already by us made as aforesaid: Then this recognizance to be void.

Battery. See Assault.

Bawdy houses. See Lewdness.

Beer. See Excise.

Behaviour. See Surety.

Bent.

Bent.

WHEREAS on the north west coasts of *England*, and especially in the county of *Lancaster*, the sea is bounded, and the lands are prevented from being overflowed, by large hills, the sand of which is so loose, that in dry weather it is thrown by the winds on the adjacent lands, to the damage thereof, and the danger of the inhabitants, who are exposed thereby to the inundation of the sea; to prevent which, the land owners are at great charges annually to plant and maintain a sort of rush or shrub called *starr* or *bent*; but many disorderly persons pluck up and carry away the same, to make mats and brushes: Therefore if any person without consent of the owner, shall cut, pull up, or carry away any *starr* or *bent* off the said hills on the northwest coasts of *England*, on complaint thereof on oath to one justice, the offender shall be summoned, and on default of appearing, the justice shall issue his warrant to apprehend and bring him before him; and being convicted on oath of one withefs, or confession, he shall forfeit 20s. half to the informer and half to the owner of the bent, by distress; and for want of sufficient distress, to be sent to the house of correction for three months, to be kept to hard labour; and for a second offence, to be committed to the house of correction for one year, to be whipt and kept to hard labour.

And if any *starr* or *bent* shall be found within five miles of the said sand hills, the persons convicted of having the same in custody shall forfeit 20s. in like manner, and for want of sufficient distress shall suffer three months imprisonment, and hard labour in the house of correction.

But this shall not restrain any persons from the exercise of any ancient prescriptive right, to cut *starr* or *bent* on the sea coasts in the county of *Cumberland*. 15 & 16 G. 2. c. 33. s. 6, 7. 8.

Bigamy.

AS *bigamy* in our law seems for the most part to be used to signify the having of two wives successively one after the other, I shall take the liberty to transfer the offence which is commonly treated of under this title unto

the title **Polygamy**, which signifies more properly the having two or more wives or husbands at the same time.

Billets. See **Fuel**.

Black act.

IN order to avoid repeating the same regulations so many times over, as the offences hereunder mentioned are treated of under their respective titles in the different parts of this book; it is thought proper, to insert here at large, the whole law relating to them all together, and to refer from thence to this title for the knowledge of the several particulars.

By the 9 *G. c.* 22. (commonly called the *Black act*) which is required to be read at every sessions and leet; and by the 6 *G. 2. c.* 37. and the 10 *G. 2. c.* 32. which by several continuances were in force till *Sept. 1. 1757, &c.* and finally by the 31 *G. 2. c.* 42. were made perpetual; and also by the 27 *G. 2. c.* 15. it is enacted as followeth:

If any person or persons, being armed with swords, fire-arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall (1) appear in any forest, chase, park, paddock, or grounds inclosed with any wall, pale, or other fence, wherein any deer have been or shall be usually kept, or (2) in any warren or place where hares or conies have been or shall be usually kept, or (3) in any high road, open heath, common, or down; or (4) shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer; or (5) unlawfully rob any warren or place where conies or hares are usually kept; or (6) shall unlawfully steal or take away any fish out of any river or pond:

Or if any person or persons (*that is whether armed and disguised or not*) shall (7) unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, fed or kept in any places in any of the king's forests or chases, which are or shall be inclosed with pales, rails, or other fences; or in any park, paddock, or grounds inclosed, where deer have been or shall be usually kept; or (8) shall unlawfully and maliciously break down the head or mound of any fish pond, whereby the fish shall be lost or destroyed; or (9) shall unlawfully and maliciously kill, maim,

maim, or wound any cattle ; or (10) cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit ; or (11) shall set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood ; or (12) shall wilfully and maliciously shoot at any person in any dwelling house or other place ; or (13) shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, venison or other valuable thing ; [or threatening to kill or murder any of his majesty's subjects, or to burn their houses, outhouses, barns, stacks of corn or grain, hay or straw ; 27 G. 2. c. 15.] or (14) shall forcibly rescue any person being lawfully in custody of any officer or other person, for any the said offences ; or (15) shall by gift or promise of money, or other reward, procure any of his majesty's subjects to join him or them in any such unlawful act ; or (16) shall unlawfully and maliciously break down, or cut down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged ; or (17) shall unlawfully and maliciously cut any hop binds growing on poles in any plantation of hops ; or (18) shall wilfully and maliciously set on fire, or cause to be set on fire, any mine, pit, or delph of coal, or cannel coal :

Every person so offending, being thereof lawfully convicted (in any county in *England*) shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy ; but not to work corruption of blood, nor forfeiture of lands or goods.

Note ; I have added the words above (*whether armed and disguised or not*) to obviate an error, as I take it, which runs thro' most of the books, in a very material part of this statute. They do suppose that a person must be *armed and disguised* to commit any of the offences abovementioned, even the sending of a threatening letter, or persuading another to be an accomplice ; whereas it seemeth somewhat clear, that to be armed and disguised is only necessary to constitute any of the six first offences, and that any person whatsoever may be guilty of any of the other following offences, whether armed and disguised or not.

And for the more easy and speedy bringing the offenders to justice, if any person shall be charged with being guilty of any the said offences, before any two justices where the offence shall be committed, by information of one or more credible persons on oath by them to be subscribed, the said
justices

justices shall forthwith certify under their hands and seals, and return such information to one of the principal secretaries of state; who shall lay the same, as soon as conveniently may be, before the king in his privy council: whereupon the king may make order in such his council, requiring the offender to surrender himself in forty days, to any of the justices of the king's bench, or to any justice of the peace, to the end that he may be forthcoming to answer the said offence according to due course of law; which order shall be printed and published in the next gazette, and shall be forthwith transmitted to the sheriff of the county where the offence was committed, and shall (in six days after receipt thereof) be proclaimed by him or his officers, between ten and two of the clock, in the market places, on the market days, of two market towns in the county, near the place where the offence was committed; and a true copy of such order shall be affixed upon some publick place in such market towns: And if such offender shall not surrender himself pursuant to such order, he shall from the day appointed for his surrender, be adjudged convicted and attainted of felony, and shall suffer pains of death, as in case of a person convicted and attainted by verdict and judgment of felony, without benefit of clergy. And the court of king's bench, or judges of assize, on producing to them such order in council, under the seal of the said council, may award execution accordingly.

And if any person, after the time appointed for surrender shall be expired, shall conceal, aid, abet, or succour such offender, knowing him to have been so charged, and to have been required to surrender himself by such order, and shall be lawfully convicted thereof; he shall be guilty of felony without benefit of clergy.

But this shall not hinder any judge, justice of the peace, magistrate, officer, or minister of justice, from apprehending and securing such offender, by the ordinary course of law: And if he be taken and secured before the time of surrender, he shall have his trial by due course of law.

And the inhabitants of the hundred shall make satisfaction (not exceeding 200*l.*) for the damages sustained by the killing or maiming of cattle; cutting down or destroying trees; setting fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood; breaking or cutting down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged; cutting hop-binds growing on poles in any plantation of hops; setting on fire, or causing to set

set on fire, any mine, pit, or delph of coal or cannel coal; the same to be rateably taxed and levied, as in cases of robbery by the statute of 27 *El. c. 13*.

But no person shall be enabled to recover damages, unless he shall by himself or servant, in two days after the damage done, give notice of the offence unto some of the inhabitants of some town, village, or hamlet near to the place where the fact was committed; and shall, in four days after such notice, give in his examination on oath, or the examination on oath of his servant who had the care of the same, before a justice inhabiting in or near the hundred, whether he knows the person or persons that committed the fact, or any of them; and if upon such examination it be confessed, that the examinant knows the said persons or any of them, then such person confessing shall be bound by recognizance to prosecute the offender by indictment or otherwise according to law.

And if an offender be apprehended and lawfully convicted, in six months after the offence committed, the hundred shall not be liable.

And the action shall not be commenced but within one year after the offence committed.

And if any person shall apprehend, or cause to be convicted, any such offender abovementioned, and shall be killed, or wounded so as to lose an eye, or the use of any limb, in apprehending or securing, or endeavouring to apprehend or secure any such offender; on proof thereof made at the sessions where the offence was committed, or the party killed or wounded, by the person so apprehending and causing the offender to be convicted, or the person so wounded, or the executors or administrators of the party killed, the justices shall give a certificate thereof to the person wounded, or to the executors or administrators of the person killed; by which they shall be intitled to receive of the sheriff 50 *l.* to be allowed in his accounts; which he shall pay in thirty days from the time the certificate shall be shewed to him, on pain of forfeiting to the party 10 *l.* for which, and for the penalty, the party may bring his action.

Black lead.

IT having been found by experience, that wad, or black cawke, commonly called black lead, is necessary for divers useful purposes, and more particularly in the casting of bomb shells, round shot, and cannon balls, and that the same hath been discovered in one mountain or ridge of

hills only in this realm, and great destruction having been made thereof of late years by evil disposed persons; therefore it is enacted, that every person who shall unlawfully break, or by force enter into, any mine or wad hole of wad or black cawke, commonly called black lead, or into any pit, shaft, or vein thereof; or shall unlawfully take and carry away from thence any wad, black cawke, or black lead; or shall aid, hire, or command any person to commit any the said offences, shall be guilty of felony, and the court or judge may order him to be committed to prison, or the house of correction not exceeding one year, to be kept to hard labour, and to be publickly whipt by the common hangman, or by the master of such house of correction, at the times, and places, and in such manner as the court shall think proper; or he may be transported for a term not exceeding seven years; and if he shall voluntarily escape, or break prison, or return from transportation before the time, he shall be guilty of felony without benefit of clergy. 25 G. 2. c. 10. §. 1.

And if any person shall buy or receive any such wad, knowing the same to be unlawfully taken and carried away as aforesaid, he shall be guilty of felony, and be liable to all the penalties inflicted by the laws on persons knowingly buying or receiving stolen goods. §. 3.

Blasphemy and profaneness.

Blasphemy.

1. **A**LL blasphemies against god, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scriptures, or exposing any part of them to contempt or ridicule; impostures in religion, as falsely pretending to extraordinary commissions from god, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous—are punishable by fine and imprisonment, and also such corporal punishment as to the court shall seem meet, according to the heinousness of the crime. 1 Haw. 6, 7.

Depraving the
established reli-
gion.

2. Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 Haw. 7.

Denying the
trinity.

3. No person shall have any benefit of the toleration act, who shall deny in his preaching or writing, the doctrine of the blessed trinity, as it is set forth in the 39 articles. 1 W. sess. 1. c. 18. §. 17.

Blasphemy and profaneness.

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4. If any person shall in any stage play, interlude, shew, may-game, or pageant, jestingly or profanely speak or use the holy name of god, or of Christ Jesus, or of the holy ghost, or of the trinity; he shall forfeit 10 l. half to the king, and half to him that shall sue. 3 J. c. 21. Representing the deity in stage plays.

5. If any person having been educated in, or at any time having made profession of the christian religion in this realm, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be god; or shall assert or maintain there are more gods than one; or shall deny the christian religion to be true, or the holy scriptures to be of divine authority; and shall be convicted thereof, in any of the courts at *Westminster*, or at the assizes, on the oaths of two witnesses, he shall for the first offence be incapable to have any office ecclesiastical, civil, or military, (unless he shall renounce such opinion in the court where he was convicted within four months after such conviction); and for the second offence he shall be disabled to be plaintiff, guardian, executor, or administrator, to take any gift or legacy, or to bear any office, and shall be imprisoned for three years. 9 & 10 W. c. 32. Christians depraving the christian religion.

But no person shall be prosecuted for any words spoken, unless the information be given to a justice of the peace, within four days after the words spoken, and the prosecution of such offence be within three months after such information. *id.*

6. *M. 1 G. 2. K. and Curl.* An information was exhibited by the attorney general, against *Edmund Curl*, for printing and publishing two obscene books, the one styled *The nun in her smock*; the other, *The art of flogging*; setting out the several lewd passages, and concluding against the peace. And of this the defendant was found guilty. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners; yet it cannot be a libel, for which he is punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was an offence properly within their jurisdiction; they said, that religion is a part of the common law, and therefore whatever is an offence against that, is evidently an offence against the common law. And the defendant was set in the pillory. *Str.* 788. 1 *Barnardist.* 29. Case of Edmund Curl.

7. *E. 2 G. 2. K. and Woolston.* He was convicted on four informations, for his blasphemous discourses on the miracles of our saviour. And attempting to move in arrest of judgment, the court declared they would not suffer it. Case of Thomas Woolston.

it to be debated, whether to write against christianity *in general* was not an offence punishable in the temporal courts at common law: They desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up, and fined 25 l. for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000 l. and 2000 l. by others. *Str.* 834.

Case of James
Nayler.

8. In the year 1656, *James Nayler* for personating our saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced to be set in the pillory, and to have his tongue bored thro' with a red hot iron, and to be whipped, and stigmatized in the forehead with the letter B.

Navy.

9. All persons in or belonging to his majesty's ships or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of god's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose. 22 G. 2. c. 33. *Art.* 2.

For profane cursing and swearing, see title **Swearing**.

Blood corrupted. See **Forfeiture**.

Bone-lace. See **Buttons**.

Books.

IF any book shall be taken or otherwise lost out of any parochial library; any justice may grant his warrant to search for it; and if it shall be found, it shall by order of such justice be restored to the library. 7 *Ann.* c. 14. s. 10.

Books popish. See **Papery**.

Bows. See **Game**.

Brandy. See **Excise**.

Brass. See **Pewter**.

Bread.

Bread.

THE statute of the 31 G. 2. c. 29. repeals all the former laws relating to the assize of bread, and re-enacts the same, with additions and amendments. Which, throughout the whole, is a very regular and judicious act; so that the author hath nothing more to do than to abridge the same in the order as it stands: not being able, in point of method, to alter it for the better.

1. To the intent that a plain and constant rule and method may be duly observed, in making and assizing of the several sorts of bread which shall be made for sale, in any place where an assize shall be thought proper to be set; it is enacted, that it shall be lawful for the court, or for the person or persons herein authorized to set the assize of bread, to set and ascertain in any place within their jurisdiction, the assize and weight of all sorts of bread which shall be made for sale, or exposed to sale, and the price to be paid for the same, when and as often as they shall think proper. 31 G. 2. c. 29. f. 2. Power to set the assize.

2. And therein respect shall be had to the price, which the grain, meal, or flour shall bear, in the market or markets in or near to the places for which such assize shall be set. *id.* In proportion to the price of corn.

3. And making reasonable allowance to the bakers, for their charges, labour, and profit, as they shall deem proper. *id.* Allowance to the bakers.

4. Where an assize shall be thought proper to be set, no person shall make for sale, or sell, or expose to or for sale, any sort of bread, except wheaten and household (otherwise brown bread), and such other sorts of bread as shall be allowed in the assize: But where it hath been usual to make, or the persons setting the assize shall allow the making of bread, with the meal or flour of rye, barley, oats, beans, or pease, or of any such different sorts of grain mixed together; the same may be there made and sold accordingly: And if any persons shall offend in the premises, and be convicted thereof by confession or oath of one witness, before any magistrate or justice within the limits of their jurisdiction; he shall forfeit not exceeding 40s. nor less than 20s. f. 3. Penalty of disobeying the assize.

5. And in every place where an assize shall be thought proper to be set; the assize and weight of the several sorts of bread which shall be there made, shall be set according to the following tables: Tables of assize.

TABLE I.

Of the afize and price of bread made of Wheat.

Price of the buſhel of wheat and ba- king.	Weight.		Price.							
	The penny loaf.		Quartern loaf.		Half peck.		Peck loaf.			
	Wheaten s. d.	Household oz. dr.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.
2 9	22 4	29 4	0 3 $\frac{1}{4}$	0 2 $\frac{1}{4}$	0 6 $\frac{1}{4}$	0 4 $\frac{3}{4}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$
3 0	20 4	27 1	0 3 $\frac{1}{2}$	0 2 $\frac{1}{2}$	0 7	0 5 $\frac{1}{4}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{4}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{4}$
3 3	18 9	25 4	0 3 $\frac{3}{4}$	0 2 $\frac{3}{4}$	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 3	0 11	1 3	0 11
3 6	17 6	23 3	0 4	0 3	0 8	0 6	1 4	1 0	1 4	1 0
3 9	16 6	21 6	0 4 $\frac{1}{4}$	0 3 $\frac{1}{4}$	0 8 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 5	1 1	1 5	1 1
4 0	15 4	20 4	0 4 $\frac{1}{2}$	0 3 $\frac{1}{2}$	0 9	0 6 $\frac{3}{4}$	1 6 $\frac{1}{4}$	1 1 $\frac{3}{4}$	1 6 $\frac{1}{4}$	1 1 $\frac{3}{4}$
4 3	14 4	19 1	0 4 $\frac{3}{4}$	0 3 $\frac{3}{4}$	0 9 $\frac{1}{4}$	0 7 $\frac{1}{4}$	1 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$	1 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$
4 6	13 9	17 15	0 5	0 3 $\frac{3}{4}$	0 10 $\frac{1}{4}$	0 7 $\frac{3}{4}$	1 8 $\frac{1}{2}$	1 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	1 3 $\frac{1}{2}$
4 9	12 12	17 1	0 5 $\frac{1}{2}$	0 4	0 10 $\frac{1}{2}$	0 8	1 9 $\frac{3}{4}$	1 4 $\frac{3}{4}$	1 9 $\frac{3}{4}$	1 4 $\frac{3}{4}$
5 0	12 1	16 6	0 5 $\frac{3}{4}$	0 4 $\frac{1}{4}$	0 11 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 11	1 5	1 11	1 5
5 3	11 9	15 7	0 6	0 4 $\frac{1}{2}$	1 0	0 9	2 0	1 6	2 0	1 6
5 6	11 2	14 10	0 6 $\frac{1}{4}$	0 4 $\frac{3}{4}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	2 1	1 7	2 1	1 7
5 9	10 8	14 4	0 6 $\frac{1}{2}$	0 5	1 1 $\frac{1}{4}$	0 9 $\frac{3}{4}$	2 2 $\frac{1}{2}$	1 7 $\frac{1}{2}$	2 2 $\frac{1}{2}$	1 7 $\frac{1}{2}$
6 0	10 2	13 9	0 7	0 5 $\frac{1}{4}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{4}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$
6 3	9 11	13 1	0 7 $\frac{1}{4}$	0 5 $\frac{1}{2}$	1 2 $\frac{1}{4}$	0 10 $\frac{1}{2}$	2 4 $\frac{1}{4}$	1 9 $\frac{1}{4}$	2 4 $\frac{1}{4}$	1 9 $\frac{1}{4}$
6 6	9 4	12 10	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 3	0 11	2 6	1 10	2 6	1 10
6 9	9 0	12 1	0 7 $\frac{3}{4}$	0 5 $\frac{3}{4}$	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7	1 11	2 7	1 11
7 0	8 11	11 9	0 8	0 6	1 4	1 0	2 8	2 0	2 8	2 0
7 3	8 7	11 2	0 8 $\frac{1}{4}$	0 6 $\frac{1}{4}$	1 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	2 9	2 1	2 9	2 1
7 6	8 3	10 11	0 8 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 5	1 1	2 10	2 2	2 10	2 2
7 9	7 14	10 6	0 8 $\frac{3}{4}$	0 6 $\frac{3}{4}$	1 5 $\frac{1}{2}$	1 1 $\frac{1}{2}$	2 11 $\frac{1}{4}$	2 2 $\frac{3}{4}$	2 11 $\frac{1}{4}$	2 2 $\frac{3}{4}$
8 0	7 10	10 2	0 9 $\frac{1}{4}$	0 6 $\frac{3}{4}$	1 6 $\frac{1}{4}$	1 1 $\frac{3}{4}$	3 0 $\frac{1}{2}$	2 3 $\frac{1}{2}$	3 0 $\frac{1}{2}$	2 3 $\frac{1}{2}$
8 3	7 5	9 15	0 9 $\frac{1}{2}$	0 7	1 7	1 2	3 2	2 4	3 2	2 4
8 6	7 2	9 9	0 9 $\frac{3}{4}$	0 7 $\frac{1}{4}$	1 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$	3 3	2 5	3 3	2 5
8 9	6 15	9 4	0 10	0 7 $\frac{1}{2}$	1 8	1 3	3 4	2 6	3 4	2 6
9 0	6 13	8 15	0 10 $\frac{1}{4}$	0 7 $\frac{3}{4}$	1 8 $\frac{1}{2}$	1 3 $\frac{1}{2}$	3 5	2 7	3 5	2 7
9 3	6 9	8 12	0 10 $\frac{1}{2}$	0 8	1 9	1 3 $\frac{3}{4}$	3 6 $\frac{1}{4}$	2 7 $\frac{3}{4}$	3 6 $\frac{1}{4}$	2 7 $\frac{3}{4}$
9 6	6 7	8 8	0 10 $\frac{3}{4}$	0 8 $\frac{1}{4}$	1 9 $\frac{3}{4}$	1 4 $\frac{1}{4}$	3 7 $\frac{1}{4}$	2 8 $\frac{3}{4}$	3 7 $\frac{1}{4}$	2 8 $\frac{3}{4}$
9 9	6 4	8 5	0 11	0 8 $\frac{1}{4}$	1 10 $\frac{1}{4}$	1 4 $\frac{3}{4}$	3 8 $\frac{1}{2}$	2 9 $\frac{1}{2}$	3 8 $\frac{1}{2}$	2 9 $\frac{1}{2}$
10 0	6 1	8 2	0 11 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 11	1 5	3 10	2 10	3 10	2 10
10 3	5 15	7 15	0 11 $\frac{3}{4}$	0 8 $\frac{3}{4}$	1 11 $\frac{1}{2}$	1 5 $\frac{1}{2}$	3 11	2 11	3 11	2 11
10 6	5 13	7 12	1 0	0 9	2 0	1 6	4 0	3 0	4 0	3 0
10 9	5 11	7 9	1 0 $\frac{1}{4}$	0 9 $\frac{1}{4}$	2 0 $\frac{1}{2}$	1 6 $\frac{1}{2}$	4 1	3 1	4 1	3 1

Price

Price of the bushel of wheat and bak- ing.	Weight.				Price.											
	The penny loaf.				Quartern loaf.				Half peck.				Peck loaf.			
	Wheaten		Household		Wheaten		Household		Wheaten		Household		Wheaten		Household	
s. d.	oz.	dr.	oz.	dr.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
11 0	5	9	7	5	1 0 $\frac{1}{2}$	0 9 $\frac{3}{4}$	2 1	1 7	4 2	3 2	4 3 $\frac{1}{4}$	3 2 $\frac{1}{2}$	4 4 $\frac{1}{2}$	3 3 $\frac{1}{2}$		
11 3	5	6	7	3	1 0 $\frac{3}{4}$	0 9 $\frac{1}{4}$	2 1 $\frac{3}{4}$	1 7 $\frac{1}{4}$	4 3 $\frac{1}{2}$	3 3 $\frac{1}{2}$	4 4 $\frac{1}{2}$	3 3 $\frac{1}{2}$				
11 6	5	5	7	2	1 1	0 10	2 2 $\frac{1}{4}$	1 7 $\frac{3}{4}$	4 4 $\frac{1}{2}$	3 3 $\frac{1}{2}$						
11 9	5	2	6	15	1 1 $\frac{1}{2}$	0 10	2 3	1 8	4 6	3 4						
12 0	5	1	6	13	1 1 $\frac{3}{4}$	0 10 $\frac{1}{4}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	4 7	3 5						
12 3	4	15	6	10	1 2	0 10 $\frac{1}{2}$	2 4	1 9	4 8	3 6						
12 6	4	14	6	8	1 2 $\frac{1}{4}$	0 10 $\frac{3}{4}$	2 4 $\frac{1}{2}$	1 9 $\frac{1}{2}$	4 9	3 7						
12 9	4	13	6	5	1 2 $\frac{1}{2}$	0 11	2 5	1 10	4 10	3 8						
13 0	4	11	6	4	1 3	0 11 $\frac{1}{4}$	2 5 $\frac{3}{4}$	1 10 $\frac{1}{4}$	4 11 $\frac{1}{2}$	3 8 $\frac{1}{2}$						
13 3	4	9	6	3	1 3 $\frac{1}{4}$	0 11 $\frac{1}{2}$	2 6 $\frac{1}{2}$	1 10 $\frac{1}{2}$	5 1	3 9						
13 6	4	8	6	1	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7	1 11	5 2	3 10						
13 9	4	7	5	15	1 3 $\frac{3}{4}$	0 11 $\frac{3}{4}$	2 7 $\frac{1}{2}$	1 11 $\frac{1}{2}$	5 3	3 11						
14 0	4	5	5	13	1 4	1 0	2 8	2 0	5 4	4 0						
14 3	4	4	5	11	1 4 $\frac{1}{2}$	1 0 $\frac{1}{4}$	2 8 $\frac{1}{2}$	2 0 $\frac{1}{2}$	5 5	4 1						
14 6	4	3	5	9	1 5	1 0 $\frac{1}{2}$	2 9	2 1	5 6	4 2						

In the first column is the price of the bushel of wheat *Winchester* measure, from 2 s. 9 d. to 14 s. 6 d. a bushel, the allowance of the magistrates or justices to the baker for baking being included; and in the next two columns are the *weights* of the several loaves: Then in the other columns are the *prices*. So that, for example, if the price of wheat is 5 s. a bushel, and the magistrates allowance 1 s. 6 d. to the baker for baking; then opposite to 6 s. 6 d. in the first column, will be found the weight and prices of the several loaves.

And as the weight of the penny loaf is here only specified, the weight of larger loaves may easily be ascertained by addition; as for example, a twopenny loaf (when wheat is at the same rate) is twice as much as the penny loaf, the sixpenny loaf six times as much, and the eighteen penny loaf eighteen times as much.

Note, the wheaten loaves are three fourths of the weight of the household loaves; and if the magistrates or justices shall think fit to allow of any white loaves of the price of one penny or two pence, they are to weigh three fourths of the weight of the wheaten loaves of the same price.

And note, that the prices of the household loaves are always three fourths of the prices of the wheaten loaves; and

and where it shall be thought proper to allow of half quarter loaves, the prices of such loaves (if sold singly) are to be half a farthing higher than is allowed by this table, when it shall so happen that the farthing is split.

And magistrates and justices being to set the assize and fix the price of the several loaves of bread, having respect to the price which the grain, meal, or flour, of which the same are made, shall bear in the market; but no provision being made how they should know what price the respective sorts of meal and flour should be esteemed to bear, in proportion to the price of wheat; they are therefore to take notice, that the peck loaf of each sort of bread is to weigh when well baked, 17 lb. 6 oz. averdupois weight (which consists of 16 drachms to the ounce, and 16 ounces to the pound), and the rest in proportion; and that every sack of meal or flour is to weigh 2 cwt. and 2 qrs. net; and that from every sack of meal or flour there ought to be produced, on the average, 20 such peck loaves of bread; and, by observing the said rule, magistrates and justices may at all times know if the baker hath more or less than the allowance they intend to give him.

T A B L E II.

Of the assize and price of bread made of the several grains here under mentioned.

This table is divided into three columns. Column 1. contains the prices of the bushel of grain, the allowance for baking included; which prices are adapted so as to serve either for the *Winchester* bushel of rye, barley, oats, beans, massin (otherwise miscellany, consisting of two thirds wheat and one third rye); the price of either of which bushels in the market being known, the magistrates are to add the intended allowance thereto; the amount of which being found in column 1. the weight which the loaves ought to be will be found under the column No 2. and the price of the respective peck loaves (which are to weigh 17 lb. 6 oz. each) under No 3.

Example: When the price of the bushel of barley in the market, with the allowance to the baker is 4 s. look for that sum in column 1, and under their respective titles in the same line will be found the weights which the several assize barley loaves should be of, and the price of the peck barley loaf; and so of each of the other sorts.

Note,

Note, where bread is allowed at any time to be made for sale, of pease only ; the assize and price thereof are to be set and fixed from the bean columns : and where bread is ordered to be made for sale, of a coarse sort of maslin or miscellany grain, consisting of one third rye, one third barley, and one third either pease or beans, the assize and price thereof are to be set and fixed from the barley columns.

Note also, that this table is framed for bread to be made of the whole produce of the said several grains, except the bran or hull thereof only.

Bread.

No 1.		Price of the buffel and ba- king d.		Rye.		Barley.		Oats.		Beans.		Maffin.	
s.	d.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.
1	0	35	11	38	9	17	14	47	14	40	0	40	0
2	0	31	4	33	12	15	10	41	14	35	0	35	0
2	3	27	13	30	0	13	14	37	4	31	2	31	2
2	6	25	0	27	0	12	8	33	8	28	0	28	0
2	9	22	11	24	9	11	6	30	7	25	6	25	6
3	0	20	13	22	8	10	7	27	14	23	5	23	5
3	6	19	4	20	12	9	10	25	12	21	8	21	8
3	9	17	13	19	4	8	15	23	15	20	0	20	0
3	9	16	11	18	0	8	5	22	5	18	10	18	10
4	0	15	10	16	14	7	13	20	15	17	8	17	8
4	6	14	12	15	14	7	6	19	11	16	8	16	8
4	6	13	14	15	0	6	15	18	10	15	9	15	9
4	9	13	2	14	4	6	9	17	11	14	12	14	12
5	0	12	8	13	8	6	4	16	12	14	0	14	0
5	3	11	14	12	14	5	15	15	15	13	5	13	5
5	6	11	5	12	4	5	11	15	3	12	11	12	11
5	9	10	13	11	12	5	7	14	9	12	2	12	2
6	0	10	6	11	4	5	3	13	15	11	10	11	10
6	6	10	0	10	13	5	0	13	6	11	3	11	3
6	9	9	10	10	6	4	13	12	14	10	12	10	12
6	9	9	4	10	0	4	10	12	6	10	6	10	6
8	0	8	15	9	10	4	7	11	15	10	0	10	0

Rye.		Barley.		Oats.		Beans.		Mellin.	
s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
0	4	0	4	0	9	0	3	0	4
0	5	0	5	0	11	0	4	0	5
0	6	0	6	1	1	0	5	0	6
0	7	0	7	1	3	0	5	0	7
0	8	0	8	1	5	0	6	0	8
0	10	0	9	1	7	0	7	0	9
0	11	0	10	1	10	0	8	0	10
0	12	0	11	1	12	0	9	0	11
1	0	1	0	2	1	0	10	1	0
1	1	1	1	2	2	0	11	1	1
1	2	1	2	2	4	0	12	1	2
1	3	1	3	2	6	0	13	1	3
1	4	1	4	2	8	0	14	1	4
1	5	1	5	2	11	0	15	1	5
1	6	1	6	2	13	0	16	1	6
1	7	1	7	2	15	0	17	1	7
1	8	1	8	3	0	1	18	1	8
1	9	1	9	3	2	1	19	1	9
1	10	1	10	3	5	1	20	1	10
1	11	1	11	3	8	1	21	1	11
1	12	1	12	3	11	1	22	1	12
2	0	2	0	4	1	1	23	2	0
2	1	2	1	4	3	1	24	2	1
2	2	2	2	4	5	1	25	2	2
2	3	2	3	4	7	1	26	2	3
2	4	2	4	4	9	1	27	2	4
2	5	2	5	4	12	1	28	2	5
2	6	2	6	5	0	1	29	2	6
2	7	2	7	5	2	1	30	2	7

6. Every affize which shall be set, in any city, town corporate, hundred, division, liberty, rape, or wapentake, shall be set in averdupois weight, and not troy weight; and in the proportions directed by the said tables, or as near as may be; and the said tables shall extend as well to such bread which shall be made of the flour of wheat mixed with the flour of other grain, as also to bread which shall be made with the flour of other grain than wheat, which shall be publickly allowed in any place to be made into bread; and the affize of all such mixed bread shall be set as near as may be according to the said tables. *f. 5.*

Affize to be set
in averdupois
weight.

7. The prices which the several kinds of grain, meal, and flour, allowed to be made into bread, shall bona fide sell for in the markets or places in *London*, where such grain, meal, and flour shall be publickly sold during the whole market, and not at particular times thereof, or on particular contracts only, shall from time to time be given in and certified on oath, on some certain day in every week, as the court of mayor and aldermen shall appoint, by the meal weighers of the said city or such other persons as the said court shall direct; and shall also, on some certain day in every week to be appointed by the said court, be entred by such meal weighers or other persons to be appointed as aforesaid, in writing under their hands, in some book for that purpose to be provided by the said city, and kept at the town clerk's office. And the next day after every such price shall be so given in and certified, the affize and weight of all sorts of bread to be sold or exposed to sale, and the price to be paid for the same, shall from time to time be set by the said court, if then sitting; if not, then by the mayor of the said city. And the affize so set shall take place from such time as the said court shall order, and be in force for the said city of *London* and the liberties thereof and the weekly bills of mortality (the city of *Westminster* and liberties thereof, the borough of *Southwark*, and weekly bills of mortality in the county of *Surrey* excepted) until a new or other affize in *London* shall be set. And after the setting of every such affize by the said court, or by the mayor when the said court shall not sit; the affize so set shall, with all convenient speed be made publick in such manner as the said court shall direct. But before any advance or reduction shall in any week be made by the said court or mayor, in the price of bread; the meal weighers or such other persons as aforesaid appointed to make return of the prices

Prices of grain
how to be cer-
tified in *London*.

prices of grain, meal, and flour, shall leave in writing at the common hall of the company of bakers, a copy of every return so made and entred by them as aforefaid, some time of the same day on which they shall make the said return and entry: to the intent that the said company may, in the morning of the next day after every such return and entry shall be made, and before any assize shall be set, have an opportunity to offer to the said court or mayor respectively, all such objections as they shall think fit, against any advance or reduction being that day made. *f. 6.*

How in other cities and towns corporate.

8. The court of mayor and aldermen of every other city where there shall be any such court, and when such court shall sit; and where there shall be no such court, or being any such, when the same shall not sit, the mayor, bailiffs, or other chief magistrate or magistrates of every such other respective city; and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magistrate or magistrates of every such town corporate or borough; or two justices in such towns and places where there shall be no such mayor, bailiffs, aldermen, or chief magistrates; shall and may from time to time as there shall be occasion, cause the respective prices which the several sorts of grain, meal, and flour (fit to make the different sorts of bread allowed there) shall *bona fide* sell for in the respective publick markets in or near to such place, during the whole market, and not at particular times thereof, or on particular contracts only, to be given in to them and certified upon oath, in such manner, and by such persons, and on such day in every week, as they shall respectively appoint. And the price which shall be so certified, shall be entered by the persons who shall certify the same, in books to be provided and kept by them for that purpose. And within two days after every such price shall be so returned, the assize and weight of bread for such place, and the price to be paid for the same, shall be set by such court or magistrates respectively as aforefaid. And the assize so set shall commence on such day in every week, and be in force for such time not exceeding seven days from the setting of such assize, as such court or magistrates respectively shall direct. *f. 7.*

How in places within counties at large.

9. If two justices of counties at large, ridings, or divisions, shall at any time think fit to set an assize of bread, for any place within the limits of their jurisdiction; in such case, it shall be lawful for such two justices, to cause the price which grain, meal, and flour (fit to make the several sorts of bread that shall be made for

sale

sale in any such place) shall *bona fide* sell for in the respective publick corn market or markets in or near any such place, during the whole market, and not at any particular times thereof, or on special contracts only, to be given and certified on oath to them at their respective places of abode, on such day in every week as they shall appoint, by the clerks of the market or markets in or near such places, or such other person as they shall for that purpose appoint. And the price so returned shall be entered by the persons so returning the same in books to be provided by them and kept for that purpose. And within two days after such return, the assize may be by them set for every such place, for any time not exceeding 14 days from the setting thereof. And the assize so set from time to time, shall commence and be in force at such time after every setting thereof, and be made publick in such places for which the same shall be so set, in such manner as the justices who set the same shall direct.

s. 8.

10. Any maker of bread for sale in any such other city, town corporate, borough, or place, where the assize shall at any time be thought proper to be set, shall have liberty at all seasonable times, in the day time, the next day after such returns shall be made and entered as aforesaid, to see the said entry, without paying any thing for the same; to the intent every such maker of bread for sale may have an opportunity on the said next day after such entry made as aforesaid, to offer to any such court, mayor, bailiffs, aldermen, or other chief magistrate or magistrates, or justices as aforesaid, who shall think fit to set such assize within their respective jurisdictions, and before any such assize shall be set, such objections as he can reasonably make against any advance or reduction to be made in such assize so to be set as aforesaid.

s. 9.

Bakers may inspect the certificate.

11. No baker of bread for sale shall be liable to pay any fee, gratuity, or reward, to any person for or by means of any assize to be set.

s. 10.

Bakers to pay no fee for the assize.

12. The form of the return or certificate shall be to the effect following.

Form of the returns to be made,

The prices of grain, meal, and flour, as sold in the corn market in ——— in the ——— of ——— the ——— day of ———.

The best wheat at ——— by the bushel.
The second at ——— by ditto.

The third at	— — — —	by ditto.
The best wheaten flour at	— — — —	by the sack.
Houſhold flour at	— — — —	by ditto.
Rye at	— — — —	by the buſhel.
Rye meal or flour at	— — — —	by the buſhel.
Barley at	— — — —	by ditto.
Barley meal at	— — — —	by ditto.
Oats at	— — — —	by ditto.
Oatmeal at	— — — —	by — — — —
White peaſe at	— — — —	by the buſhel.
White pea flour or meal at	— — — —	by — — — —
Beans at	— — — —	by the buſhel.
Bean meal or flour at	— — — —	by — — — —

To every of which returns the perſons appointed to make the ſame ſhall ſign their names or marks. *f. 11.*
 Form of publication of the aſſize. 13. When an aſſize ſhall be ſet, the ſame ſhall be made publick in the form or to the effect following :

— — — — To wit, } The aſſize of bread ſet the — — — — day
 of — — — — for — — — — to take place on
 the — — — — day of — — — — now next
 enſuing, and to be in force — — — — for the
 ſaid — — — — of — — — —.

And in places where penny, two-penny, fix-penny, twelve-penny, and eighteen-penny loaves, ſhall be made, as followeth :

	lb.	oz.	dr.
The penny loaf wheaten is to weigh			
Ditto houſhold is to weigh	— — — —		
The two-penny loaf wheaten is to weigh	— — — —		
Ditto houſhold is to weigh	— — — —		
The fix-penny loaf wheaten is to weigh	— — — —		
Ditto houſhold is to weigh	— — — —		
The twelve-penny loaf wheaten is to weigh	— — — —		
Ditto houſhold is to weigh	— — — —		
The eighteen-penny loaf wheaten is to weigh	— — — —		
Ditto houſhold is to weigh	— — — —		

And in places where quartern, half-peck, and peck loaves shall be made, then as follows :

	lb.	oz.	dr.		s.	d.
The peck loaf wheaten is to weigh				and is to be fold for		
Ditto hous- hold is to weigh.				and is to be fold for		

And the half peck and quarter of a peck loaves of wheaten and household bread are to weigh, in proportion to the weight a peck loaf of wheaten or household bread ought to weigh ; and to be fold accordingly in proportion. And when any bread shall be ordered to be made with the meal or flower of rye, barley, oats, pease or beans, either alone, or mixed with the meal or flour of any other grain ; the affize of such bread shall be made publick, in such manner as the magistrates or justices, who shall set such affize, shall from time to time direct. *f. 12.*

14. In places where any six-penny, twelve-penny, and eighteen-penny loaves shall be allowed to be made or sold, no peck, half peck, or quarter of a peck loaves shall be allowed at the same time to be made or sold ; to the intent that one of those sorts of loaves may not be sold, designedly or otherwise, for the other sort thereof, to the injury of unwary people : on pain that every one offending in the premises shall forfeit not exceeding 40 s. nor less than 20 s. as the magistrate or justice before whom such offender shall be convicted shall think fit. *f. 13.*

Bread of different denominations not to be allowed at the same time.

15. If the justices of any county, riding, or division, shall in their sessions think fit to ascertain, that any hundred or other place within such division ought to be estimated as of or in any one particular hundred, riding, or division of any such county, riding, or division, in order that the affize of bread which shall be set for such particular hundred or place may extend to or comprize such other hundred or place ; in such case, it shall be lawful for them so to do : but by so doing thereof, no justice of any such county, riding or division shall be excluded from acting as a justice in any hundred, riding, or division of any such

Hundreds may be divided into acting the affize.

such county, in which any such particular towns, districts, or places shall lie, or the assize for them shall be set. *f. 14.*

Clerk of the market to keep books.

16. An entry shall be made from time to time by the clerk of the market, or other person appointed to make return as aforesaid, in a book to be provided and kept by him, of every return by him made; and also of the rate at which the price, assize, and weight of bread shall be set within his jurisdiction: which book any inhabitant may at all reasonable times in the day inspect without fee. *f. 15.*

Assize not to be altered till the price of corn alters 3d. a bushel.

17. After the assize shall be set no alteration shall be made therein in any subsequent week, either to rise or sink the same, except when the price of wheat or other grain shall be returned as having risen or fallen 3d. a bushel since the last return; no provision being made by the assize tables for altering any assize, when the variation in the price shall not have amounted to, and been returned 3d. a bushel. *f. 16.*

Punishment of officers for default.

18. If any meal weigher, clerk of the market, or other person appointed to make returns as aforesaid, shall neglect, omit, or refuse to do any thing by this act required to be done by him, or shall designedly or knowingly make any false return; or if any constable or other peace officer shall refuse or neglect to obey any warrant in writing delivered to him under the hand and seal of any magistrate or justice, or to do any other act requisite to be done by him for carrying this act into execution; he shall forfeit not exceeding 5l. nor less than 20s. *f. 17.*

Buyer or seller to declare the price of corn.

19. If any buyer or seller of or dealer in corn, grain, meal, or flower, on reasonable request to him made by the meal weighers of the city of *London*, or by the clerks of the market or other persons respectively appointed to make returns as aforesaid, shall refuse to disclose and make known to them the true real prices which the several sorts of grain meal and flour shall be *bona fide* bought at or sold by or for him, at any corn market, or other place where corn, grain, meal, or flour is usually openly or publicly sold; or shall knowingly give in any false or untrue price, or which hath been made by any deceitful means; he shall, on conviction thereof by confession, or oath of one witness, or affirmation of a quaker, forfeit not more than 10l. nor less than 40s. *f. 18.*

Magistrates may send for them.

20. If any court, magistrate, or justices, who shall have ordered any return to be made as aforesaid, shall within three days after such return suspect, that the same was not truly and *bona fide* made; they may summon before

fore them any person who shall have bought or sold, or agreed to buy or sell any grain, meal or flour within their respective jurisdictions, or who shall be thought to be likely to give any information concerning the premises; and may examine them upon oath, touching the rates and prices, which the several sorts of grain, meal and flour, or any of them, were really and *bona fide* bought at or sold for, or agreed so to be, by him, at any time within seven days preceeding such summons. And if any person so summoned shall neglect or refuse to appear (proof of such summons being made upon oath); or if any person so summoned shall appear, and neglect or refuse to answer such lawful questions touching the premises as shall be proposed to him, without some just or reasonable excuse to be allowed by such court, magistrate, or justices; he shall, on conviction by oath of one witness, or by confession, forfeit not exceeding 10*l.* nor less than 40*s.* And if any person so examined, shall wilfully forswear himself, he shall suffer as in cases of perjury.—Provided, that the party summoned be not obliged to travel above five miles from the place of his abode. *f.* 19.

21. Whenever any court, magistrate, or justices as Bakers of bread made of other grain than wheat shall conform to the assize. afore said, shall order any bread to be made with the flour or meal of any other grain than wheat, or to be mixed with the flour of wheat, or to be made with the flour or meal of any other sorts of grain, either separate or mixed together; all persons who shall make any bread for sale, in any place where such order shall be made, shall make bread with such mixed meal or flour, in such manner, and of such weight and goodness, and shall sell the same at such prices, as such court, magistrate, or justices respectively shall direct: on pain of forfeiting not more than 5*l.* not less than 40*s.* *f.* 20.

22. The several sorts of bread which shall be made for True making of bread. sale, or sold, or exposed to or for sale, shall always be well made, and in their several and respective degrees, according to the goodness of the several sorts of meal or flour whereof the same ought to be made; and no allum, or preparation or mixture in which allum shall be an ingredient, or any other ingredient or mixture whatsoever (except only the genuine meal or flour which ought to be put therein, and common salt, pure water, eggs, milk, yeast, and barm, or such leaven as shall be allowed to be put therein by those who have set the assize, and where no assize shall be set, then such leaven as any magistrate or justice within his jurisdiction shall allow to be used in making of bread) shall be put into, or in any wise used

in making dough, or any bread to be sold, or as or for leaven to ferment any dough, or on any other account, in the trade or mystery of making bread, under any colour or pretence whatsoever; on pain that every person (other than a servant or journeyman) who shall knowingly offend in the premises, and shall be convicted (A) thereof by confession, or oath of one witness, before any such magistrate or justice respectively, shall forfeit not more than 10*l.* nor less than 40*s.* or shall by warrant of such magistrate or justice be apprehended and committed to the house of correction, or some prison of the county, city, town corporate, borough, riding, division, or place, where the offence shall have been committed, or the offender shall be apprehended, there to remain and be kept to hard labour, for any time not exceeding one calendar month, nor less than ten days from the time of such commitment, as such magistrate or justice shall think fit. And if any servant or journeyman baker shall knowingly offend in the premises, and be convicted thereof as aforesaid; he shall forfeit not more than 5*l.* nor less than 20*s.* or shall in like manner be committed to the house of correction or prison as aforesaid. And it shall be lawful for the magistrate or justice, before whom such offender shall be convicted, out of the money forfeited, when recovered, to cause the offender's name, place of abode, and offence, to be published in some news paper, which shall be printed or published in or near the county, city, or place, where any such offence shall have been committed. *f. 21.*

Adulterating
meal.

23. No person shall knowingly put into any corn, meal, or flower, which shall be ground, dressed, bolted, or manufactured for sale, either at the time of grinding, dressing, bolting, or in any wise manufacturing the same, or at any other time, any ingredient, mixture, or other thing whatsoever; or shall knowingly sell, offer, or expose to sale, any meal or flour of one sort of grain, as or for the meal or flour of any other sort of grain, or any thing as or for or mixed with the meal or flour of any grain which shall not be the real and genuine meal or flour of the grain the same shall import to be and ought to be; on pain of forfeiting, not more than 5*l.* nor less than 40*s.* *f. 22.*

Waste mixtures
of meal.

24. No person shall knowingly put into any bread which shall be made for sale, any mixture of meal or flour of any other sort of grain than of the grain the same shall import to be, and shall be allowed to be made of, in pursuance of this act; or shall put into any bread which shall be made for sale, any larger or other proportion of any other or
different

different sort of grain, or the meal or flour thereof, than what shall be appointed or allowed to be put therein by this act; or any mixture or thing as, for, or in lieu of flour, which shall not really be the genuine flour the same shall import to be and ought to be; on pain of forfeiting, not more than 5*l.* nor less than 20*s.* *f.* 23.

25. If any person who shall make any bread for sale, or who shall send out, or sell, or expose to or for sale, any bread which shall be deficient in weight, according to the assize which shall be set for the same; he shall forfeit (B) not exceeding 5*s.* nor less than 1*s.* for every ounce wanting in the weight every such loaf ought to be of; and for every loaf which shall be found wanting less than an ounce, shall forfeit not exceeding 2*s.* 6*d.* nor less than 6*d.* as such magistrate or justice before whom such bread shall be brought shall think fit: so as such bread which shall be complained of for wanting weight, in any city, town corporate, borough, liberty, or franchise, or the jurisdiction thereof, or within the weekly bills of mortality, shall be brought before some magistrate or justice having jurisdiction in the premises, and weighed before him, within 24 hours after the same shall have been baked, sold, or exposed to sale; and so as such bread which shall be complained of for wanting weight, in any hundred, riding, division, liberty, rape, wapentake, or place, shall be brought before some justice within such jurisdiction, and weighed before him within three days after the same shall have been baked, sold, or exposed to sale; unless it be made out to the satisfaction of such magistrate or justice, on the behalf of the party complained of, that such deficiency in weight wholly arose from some unavoidable accident in baking, or otherwise, or was occasioned by some contrivance or confederacy. *f.* 24.

Penalty for deficiency in weight.

26. Every person who shall make for sale, or sell, or expose, or send out to or for sale, any sort of bread whatsoever, shall cause to be fairly marked on every loaf made, sold, carried out, or exposed to sale as wheaten bread, a large roman W; and upon every loaf made, sold, carried out, or exposed to sale as household or brown bread, a large roman H; on pain of forfeiting for every loaf not so marked, not more than 20*s.* nor less than 5*s.* (except as to such loaves which shall be rasped after the hestpeaking or purchasing thereof, by the particular desire of any person who shall order the same to be so rasped for his own use.) *f.* 25.

Mark.

Penalty of selling for a greater price than is set by the assize.

27. No baker or other person shall ask or take, for any bread which he shall sell or expose to sale, any greater price than such bread shall be ascertained to be sold at by the assize as aforesaid; and no baker, or other person who shall make any bread for sale, shall refuse or decline to sell any loaf or loaves of any of the sorts of bread which in pursuance of this act shall be allowed or ordered to be made, to any person who shall tender ready money in payment for the same, at the price set for the same by the assize, when such person shall have any loaf in his possession to be sold, more than shall be requisite for the immediate necessary use of his family or his customers, and which it shall be incumbent on such baker or other person complained of to prove before the magistrate or justice to whom such complaint shall be made, if thereunto required by the party complaining; on pain of forfeiting for every such offence, not more than 40 s. nor less than 10 s. *f. 26.*

(And by the 2 & 3 *Ed. 6. c. 15.* If any bakers shall conspire not to sell bread but at certain prices; every such person shall forfeit 10 l. for the first offence; and if not paid in six days, he shall be imprisoned twenty days, and have only bread and water for his sustenance; for the second offence 20 l. or the pillory; and for the third offence 40 l. or the pillory, and loss of an ear, and to become infamous. And the sessions or leet may hear and determine the same.)

Bread inferior to wheaten shall not be sold for a higher price than household.

28. No person shall sell or offer to sale any bread of an inferior quality to wheaten bread, at a higher price than household bread shall be set at by the assize; on pain of forfeiting (being convicted thereof by confession, or oath of one witness, before one magistrate or justice) the sum of 20 s. *f. 27.*

Houses may be entered to search for bread.

29. It shall be lawful for any magistrate or justice, or for any peace officer authorized by warrant of such magistrate or justice, at seasonable times in the day-time, to enter into any house, shop, stall, bakehouse, warehouse, or outhouse, of or belonging to any baker or seller of bread, to search for, view, weigh, and try all or any the bread, which shall be there found: And if any bread, on any such search, shall be found to be wanting either in the goodness of the stuff whereof it shall be made, or to be deficient in the due baking or working thereof, or shall be wanting in the due weight, or not truly marked, or shall be of any other sort of bread than shall be allowed to be made by virtue of this act; any such magistrate, justice, or peace officer may seize the same; and such magistrate, or justice

may

may dispose thereof, as he in his discretion shall think fit, for the better carrying of this act into execution. *f.* 28.
32 *G.* 2. *c.* 18. *f.* 2.

30. If information shall be given on oath, to any magistrate or justice, that there is reasonable cause to suspect, that any miller who grinds any grain for toll or reward, or any person who doth dress, bolt, or in any wise manufacture any meal or flour for sale, or any maker of bread for sale, doth mix up with or put into any meal or flour ground or manufactured for sale, any mixture, ingredient, or thing whatsoever, not the genuine produce of the grain such meal or flour shall import and ought to be, or whereby the purity of any meal or flour in the possession of any such miller, mealman, or baker shall be in any wise adulterated; it shall be lawful for any such magistrate or justice, and also for any peace officer authorized by the warrant of such magistrate or justice, at all reasonable times in the day-time, to enter into any house, mill, shop, bakehouse, stall, bolting house, pastry, warehouse, or outhouse, of or belonging to any such miller, mealman, or baker, and to search and examine whether any mixture, ingredient, or thing, not the genuine produce of the grain such meal or flour shall import or ought to be, shall have been mixed up with or put into any meal or flour in the possession of any such miller, mealman or baker, either in the grinding of any grain at the mill, or in the dressing, bolting, or manufacturing thereof, or whereby the purity of any meal or flour shall be in any wise adulterated: And if on such search it shall appear, that any offence hath been committed in any place allowed to be searched as aforesaid; it shall be lawful for any magistrate, justice, or officer, authorized as aforesaid, to seize any meal or flour which shall be deemed on such search to have been adulterated, and all mixtures and ingredients which shall be found and deemed to have been used or intended to be used for such adulteration; and such thereof as shall be seized by such peace officer shall, with all convenient speed, be carried to some magistrate or justice: And if any magistrate or justice, who shall make any seizure in pursuance of this act, or to whom any thing seized shall be brought, shall adjudge that any mixture or ingredients, not the genuine produce of the grain any such meal or flour which shall have been so seized shall import and ought to be, shall have been put into any such meal or flour, or that the purity of any such meal or flour so seized was adulterated by any mixture or ingredient put therein; in such

Mills and other places may be entered to search for adulterated meal.

case, every such magistrate or justice is hereby required to dispose of the same, as he in his discretion shall think proper. 31 G. 2. c. 29. s. 29.

Penalty of having
in possession un-
lawful ingre-
dients.

31. Every miller, mealman, baker, or feller of bread as aforesaid, in whose house, mill, shop, bake-house, stall, bolting house, pastry, warehouse, outhouse, or possession, any mixture or ingredient shall be found, which shall be adjudged by any magistrate or justice to have been lodged there with an intent to have adulterated the purity of meal, flour, or bread, shall on conviction by confession, or oath, of one witness before any such magistrate or justice, forfeit not exceeding 10l. nor less than 40s. unless the party charged with such offence shall make it appear to the satisfaction of such magistrate or justice, that such mixture or ingredient was not brought or lodged where the same was seized, with design to have been put into any meal or flour, or to have adulterated the purity thereof; but that the same was there for some other lawful purpose. And it shall be lawful for such magistrate or justice, out of the forfeiture when recovered, to cause the offender's name, place of abode, and offence, to be published in some news paper printed or published in or near the county, city, or place, where such offence shall have been committed. s. 30.

Penalty of ob-
structing search.

32. If any person shall obstruct or hinder such search, or the seizure of any bread or ingredients as aforesaid; he shall forfeit not exceeding 5l. nor less than 20s. s. 31.

Person interested
not to act as
a magistrate.

33. No person who shall follow or be concerned in the business of a miller, mealman, or baker, shall act as a magistrate or justice in the execution of this act; on pain of 50l. to him who will inform or sue for the same. s. 32.

Journeyman of-
fending.

34. If any person who shall follow the trade of a baker, shall make complaint to any magistrate or justice, and make appear to him by the oath of any credible witness, that any offence which he hath been charged with, and for which he shall have paid any penalty by this act, shall have been occasioned by the wilful neglect or default of any journeyman or other servant employed by him; such magistrate or justice shall issue his warrant to bring such journeyman or servant before himself or any magistrate or justice of the place where the offender can be found; and on his being apprehended and brought before such magistrate or justice, the said magistrate or justice shall examine into the matter of such complaint, and on proof thereof upon oath shall under his hand adjudge and order what reasonable sum shall be paid by such journey-
man

man or servant to his master, by way of recompence for the money he shall have paid by reason of the wilful neglect or default of such journeyman or servant. And if he shall neglect or refuse, on conviction, to pay immediately; such magistrate or justice shall commit him to the house of correction, or some other prison, of the place where he shall be apprehended or convicted, to be kept to hard labour not exceeding one calendar month, unless payment thereof shall be made after such commitment, and before the expiration of the said term of one calendar month. *f. 33.*

35. It shall be lawful for the mayor of *London*, or any aldermen thereof, within the said city or liberties; and for one justice within the several counties, ridings, divisions, cities, towns corporate, boroughs, liberties, or jurisdictions; to hear and determine, in a summary way, all offences against this act; and for that purpose to summon before him the party accused; and if he shall not appear, or offer some reasonable excuse for his default, then on oath made of the offence by one witness, such magistrate or justice shall issue his warrant for apprehending the offender: And on appearance of the party accused; or if he shall not appear, on notice being given to or left for him at his usual place of abode; or if he cannot be apprehended on a warrant granted against him as aforesaid; such magistrate or justice shall proceed to inquire of the offence, and to examine any witness or witnesses who shall be offered on either side upon oath; and shall convict or acquit the party accused: And if the penalty, on such conviction, shall not be paid within 24 hours after such conviction; such magistrate or justice shall issue his warrant directed to any peace officer to make distress; and if any offender shall convey away his goods out of the jurisdiction of such magistrate or justice, or so much thereof that the penalty cannot be levied, then some magistrate or justice within whose jurisdiction the offender shall have removed his goods shall back the said warrant, and thereupon the penalty shall be levied by distress; and if within five days the forfeiture shall not be paid, the distress shall be appraised and sold, rendering the overplus after deducting the forfeiture and the costs and charges of the prosecution, distress, and sale; which charges shall be ascertained by the magistrate or justice before whom the offender was convicted, or who backed the warrant, if either of them shall continue alive, and if not, then by some other magistrate or justice where the offender was convicted; and for want of such distress,

Manner of convicting offenders.

every such magistrate or justice within whose jurisdiction such offender shall reside or be, shall on application of the prosecutor, and proof made of the conviction and non-payment of the penalty and charges, commit such offender to the common gaol or house of correction of the division or place where the offender shall be found, there to remain for one kalendar month from the time of such commitment, unless payment shall be sooner made. *f. 34.*

And if it shall be made out on oath, to the satisfaction of any magistrate or justice, that any one is likely to give material evidence on behalf of the prosecutor or of the person accused, and will not voluntarily appear to be examined; such magistrate or justice shall issue his summons to convene such witness before him, at such reasonable time as in such summons shall be fixed: And if any person so summoned shall neglect or refuse to appear, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath of such summons) such magistrate or justice shall issue his warrant to bring such witness before him; and if on his appearance, or on being brought before such magistrate or justice, he shall refuse to be examined on oath, without offering any just excuse for such refusal, such magistrate or justice may commit him to the publick prison of the county, city, or other division, in which the person so refusing to be examined shall be, there to remain not exceeding 14 days, nor less than three, as such magistrate or justice shall direct. *f. 35.*

Form of the conviction.

36. And the conviction shall be in the form or to the effect following:

—————To wit. } **B**E it remembred, that on this ——— day of ——— in the ——— year of the reign of ——— A. O. is convicted before me one of his majesty's justices of the peace for the said county of ——— for ——— and I do adjudge him to pay and forfeit for the same the sum of ———.

Given under my hand and seal the day and year aforesaid.
f. 36.

Application of the forfeitures.

37. By a general clause in this same act, *f. 34.* All penalties and forfeitures, when recovered, shall be paid to the informer.

But by the 32 G. 2. c. 18. Such of the penalties by the aforesaid act, as thereby are not particularly disposed of, shall be one moiety thereof, where any offender shall be convicted by confession, or oath of one witness, to him who shall inform and prosecute; and the other moiety thereof,

thereof, and also all penalties and forfeitures incurred on the weighing, trying, or seizure of any bread by any magistrate or justice, shall be applied for the better carrying the said act into execution, as such magistrate or justice shall think fit. *f. 2.*

38. No certiorari shall be granted, to remove any conviction, or other proceedings had thereupon. 31 G. 2. Certiorari,

c. 29. f. 37.

39. If any person convicted shall think himself aggrieved, he may appeal to the next sessions, and the execution shall in such case be suspended; such person convicted entering into recognizance, at the time of the conviction, with two sufficient sureties, in double the sum which he shall have been adjudged to forfeit, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices at the said sessions, who shall finally determine the matter of the said appeal, and award such costs as to them shall appear just and reasonable, to be paid by either party; and if the conviction shall be affirmed, the appellant shall immediately pay down the sum adjudged, together with such costs as the justices in their said sessions shall award; and in default of payment thereof, any two such justices, or any one magistrate or justice having jurisdiction in the place into which such appellant shall escape or where he shall reside, shall commit him to the common gaol of the county, city, division, or place, where he shall be apprehended, until he shall make payment of such penalty and of the costs and charges which shall be adjudged on the conviction, to the informer: But if the appellant shall be discharged, reasonable costs shall be awarded to him against the informer, who would in case of such conviction have been intitled to a share of the penalty; and which costs shall and may be recovered by the appellant against such informer, in like manner as costs given at the sessions are recoverable. *f. 38.*

Provided, that if the conviction shall be within six days before the sessions, the party on entering into such recognizance as aforesaid, shall be at liberty to appeal, either to the then next, or to the next following sessions.

f. 39.

40. Every action which shall be brought against any magistrate, justice, or peace officer, for any thing done under this act, shall be commenced within six months, and laid in the proper county; and the act of the 24 G. 2. *c. 44.* shall extend to such magistrate or justice acting under this act. And no action shall be commenced against such

Indemnity of persons prosecuted for any thing done on this act.

such peace officer, till seven days after notice in writing shall have been given to or left for him at his usual place of abode by the prosecutor's attorney; which notice shall contain the name and place of abode of the person intending to bring such action, and also of his attorney, and likewise the cause of action: and such peace officer may within the said seven days tender satisfaction; and if the same is not accepted, the defendant may plead such tender in bar of the action, together with the general issue or any other plea with leave of the court; and if the jury shall find the amends tendred to have been sufficient, or if the plaintiff shall be nonsuit, or discontinue, or judgment be given for the defendant upon demurrer, or if the action be brought after the time limited, or not within the proper county, the jury shall find for the defendant, and he shall be intitled to his costs; but if the jury shall find, that no such tender was made, or not sufficient, or shall find against the defendant on any plea pleaded, they shall give a verdict for the plaintiff, and such damages as they shall think proper, and the plaintiff shall thereupon recover his costs against such defendant.

f. 40.

And other persons sued for any thing done on this act, may plead the general issue; and if they recover shall have treble costs. *f. 41.*

Limitation of
actions.

41. Provided always, that no person shall be convicted for any of the aforesaid offences, unless the prosecution be commenced within three days after the offence committed. *f. 42.*

Saving of the
right of others.

42. Provided also, that nothing herein shall extend to prejudice any right or custom of the city of *London*; or of the lord of any leet; or clerk of the market; or the dean of *Westminster*, or high steward of *Westminster* or his deputy; or of the universities. *f. 43, 44, 45.*

Note, the reason why the indemnifying statute of the 24 G. 2. c. 44. is here particularly mentioned, seems to be upon the account of such magistrates or chief officers who are impowered to act in setting the assize, and otherwise carrying this act into execution, that are not justices of the peace; as for instance, the court of mayor and aldermen, in most of the boroughs and towns corporate, consisteth of persons some of whom are not justices; and in others, especially the more ancient, not one of them is a justice of the peace, (the corporation having been established before there was any justice of the peace in the kingdom :) but yet they are enabled to proceed in this, and in many other instances, specially, by act of parliament.

Which

Which observation is applicable also to the power herein given to them, to issue precepts, to examine upon oath, and the like; which power is implied in the general office of a justice of the peace, but is not applicable to those others, without special words granting the same. So also it was necessary for the act to be particular, with regard to the indemnification of constables and others acting under such warrants; as also of the meal weighers, clerks of the market, and others appointed to make returns of the prices of grain, flour, and the like, who are not under the general protection of the law for their proceedings in these matters, and therefore require an express declaration in the act itself, of their authority and privilege in this respect.

43. All that hath been said above, as to the price and weight of bread, and the like, proceeds upon the supposition of an assize being set. By the 3 G. 3. c. 11. regulations are made altho' no assize is set, and further provisions are enacted as followeth:

Proceedings where the assize hath not been set.

No loaf or loaves of bread, called or deemed assize loaf or loaves in the tables of the assize and price of bread in the act of the 31 G. 2. and the weight of which varies according to the variation in the price of grain, shall be made for or exposed to sale, in any place where loaves called prized loaves in the said tables shall be allowed to be sold at the same time; that is to say, no assize loaves of the price of three pence and prized loaves called half quartern loaves, nor assize loaves of the price of six pence and prized loaves called quartern loaves, nor assize loaves of the price of twelve pence and prized loaves called half peck loaves, nor assize loaves of the price of eighteen pence and prized loaves called peck loaves, shall at the same time in any place be made for or exposed to sale, to the end that unwary persons may not be imposed on by buying assize loaves for prized loaves, or prized loaves for assize loaves; on pain that every person offending shall forfeit not exceeding 40 s. nor less than 10 s. s. 1.

And the justices, in their general, quarter, or petty sessions, may from time to time appoint, which of the sorts of assize or prized loaves, and what other sorts of bread, and of what sort of grain, shall be allowed to be made and sold within their jurisdiction or any part thereof; their order to be entred in a book, which may be inspected by the makers of bread for sale at all reasonable times of the day without fee; and they shall cause a copy thereof to be put up in some market or other publick town of the place, or else to be inserted in some publick news

news paper circulated there. — Provided, that the justices shall not at any time allow the making for sale or selling any sorts of assize bread made of the flour of wheat, other than wheaten and household bread, and loaves of white bread of the price of two pence or under. *f.* 2, 3.

And every maker of bread for sale shall observe the same proportion as to weight, as where the assize is set; that is to say, every white loaf of the price of 2d. or under, shall weigh three parts in four of the weight of the wheaten loaf of the like price; and every wheaten assize loaf, of whatever price the same shall be, shall weigh three parts in four of the weight of every household assize loaf of the like price; and every household assize loaf, shall weigh one third part more than a wheaten assize loaf of the like price; on pain of forfeiting not exceeding 40s. *f.* 4.

And every peck, half peck, quarter of a peck, and half quarter of a peck loaf, made for sale, of the flour of wheat, and called *Wheaten Bread*, shall be sold in proportion to each other, as to price; and the like, as to loaves of *Household Bread*, which shall be sold proportionably to each other, and for one fourth less than *Wheaten Bread* of the same denomination: on pain of forfeiting for every loaf, not exceeding 40s. nor less than 10s. *f.* 5.

And the weight of every sort of bread made for sale shall be in averdupois weight as follows: Every peck loaf, seventeen pounds six ounces; half peck loaf, eight pounds eleven ounces; quarter of a peck loaf, four pounds five ounces and a half; half quarter of a peck loaf, two pounds two ounces and three quarters; on pain of forfeiting for every ounce wanting not exceeding 5s. nor less than 1s. and for less than an ounce not exceeding 2s. 6d. nor less than 6d; so as the same in any city, town corporate, or within the bills of mortality, be brought before a justice and weighed before him within 24 hours after the same shall have been baked or found in any person's custody for sale, and elsewhere within three days;—unless it be made out to the satisfaction of such justice, that the deficiency in weight wholly arose from some unavoidable accident, or was occasioned by some contrivance or confederacy. *f.* 6.

And no person shall sell or offer to sale any bread of an inferior quality to wheaten bread, at an higher price than household bread; on pain of forfeiting not exceeding 40s. *f.* 7.

Every wheaten loaf shall be marked with a large Roman W; household, with a large Roman H: and if any person

person shall sell or offer to sale any such loaf unmarked (except as to such loaves which shall be rasped by the desire of the purchaser for his own use); he shall forfeit for every such loaf, not exceeding 40 s. nor less than 10 s.; unless it shall appear to the satisfaction of the justice to whom complaint shall be made, that the not marking arose from some unavoidable accident, or was occasioned by some contrivance or confederacy. *f. 8.*

And bread made of any other grain than wheat shall be marked with some letter or letters not more than two, as the justices in their general, quarter, or special sessions shall order, which order shall be entred in a book, unto which the bakers may resort in the day time without fee; and the justices shall cause a copy thereof to be put up in some market or other publick town or place within the division, or otherwise to be inserted in some publick news paper usually circulated there: And if the justices shall neglect to make such order, then the baker shall mark every such loaf with any two distinct capital letters as he shall think fit. And every person who shall make or have in his custody for sale any such loaf made of other grain than wheat, which shall not be so marked, so as the same may on view thereof be ascertained under what denomination it was made (except such loaves as shall be rasped by the desire of the purchaser for his own use); shall forfeit not exceeding 40 s. nor less than 5 s. for every loaf not so marked. *f. 9.*

And it shall be lawful for any justice, or peace officer authorized by warrant of such justice, to enter into any house, shop, stall, bakehouse, warehouse, outhouse, or other place, of or belonging to any baker or seller of bread; and to search, view, weigh, and try all or any bread which shall be there found: And if any bread shall, on any search or trial by any justice, or on proof made before him by the oath of one witness, be found to be deficient in weight, or not truly marked, or deficient in the due baking or working thereof, or wanting in the goodness of the stuff, or made with any mixture of meal or flour of any other grain than the same shall import to be made with, or with any larger or other proportion of any other grain than what ought to be put therein, or with any mixture or ingredient which by the aforesaid act ought not to be put therein, or with any thing in lieu of flour which shall not be the genuine flour the same shall import to be, or made with any leaven not allowed by the said former act; such justice or peace officer may seize the same, and dispose thereof to poor persons as to such justice

justice shall seem fit; and the maker or seller, whose bread shall be found wanting in the goodness of the stuff, or made with such undue mixture as aforesaid, or undue proportion, or made with any thing in lieu of flour which shall not be the genuine flour the same shall import to be, or with any leaven not allowed by the said act, shall forfeit not exceeding 5 l. nor less than 20 s; unless the default shall appear to have wholly arisen from some unavoidable accident, or some contrivance or confederacy. *f. 10.*

And if any person shall obstruct or oppose any such search, or seizure of such bread; he shall forfeit not exceeding 40 s. nor less than 20 s. *f. 11.*

And no person, who shall follow or be concerned in the business of a miller, mealman, or baker, shall be capable of acting in the execution of this act; and if he shall presume so to do, he shall forfeit 50 l. to him who will inform or sue for the same. *f. 12.*

Provided, that if such baker shall make it appear to any such justice, that any offence for which he shall have paid the penalty, was occasioned by the neglect or default of his journeyman or servant; the said justice shall issue his warrant for bringing such offender before him or some other justice; and, on conviction, such justice shall order what reasonable sum shall be paid by the said offender by way of recompence; and if he do not immediately pay the same, the said justice shall commit him to the house of correction or other prison of the place where he shall be apprehended, there to be kept to hard labour for any time not exceeding one calendar month, unless payment be sooner made. *f. 13.*

And one justice may hear and determine offences in like manner as by the said former act. *f. 14, 15.*

And no certiorari shall be granted, to remove any conviction or other proceedings had thereupon. *f. 17.*

With like liberty of appeal as by the said former act. *f. 18, 19.*

And persons convicted on this act, shall not be prosecuted for the same offence under any other law. *f. 23.*

And all penalties and forfeitures on this act shall go, half to the informer, and half as the justice shall order for carrying this act into execution. *f. 24.*

Finally, it is provided, that nothing herein shall extend to the universities. *f. 25.*

A. Information of an undue mixture used in making of bread.

Westmorland. **B**E it remembred, that this——day of
 of——at——in the said county, A. I. yeoman, in his
 proper person, exhibiteth to me J. P. esquire, one of his ma-
 jesty's justices of the peace for the said county, a complaint and
 information, and thereby informeth me, that A. O. late of——
 in the county aforesaid, baker, on the——day of——
 [Here specify the time of the offence, that the prosecution
 may appear to be commenced within three days after the
 offence committed, according to the 42d section of the
 aforesaid statute] did put into and use, in the making of bread
 to be sold, a preparation or mixture in which allum was an in-
 gredient, contrary to the form of the statute in such case made
 and provided; whereby the said A. O. hath forfeited a sum
 of money, not exceeding 10*l.* nor less than 40*s.* and thereupon
 the said A. I. prayeth the judgment of me the said justice in
 that behalf, and that he the said A. I. may have one moiety
 of the said forfeiture, according to the form of the statute in
 such case made; and that the said A. O. may be summoned
 to answer the premisses before me the said justice.

Summons thereupon.

Westmorland. { To the constable of——

WHEREAS a complaint and information hath been ex-
 hibited before me J. P. esquire, one of his majesty's
 justices of the peace for the said county, by A. I. yeoman, that
 A. O. late of——in the county aforesaid, baker, on the
 ——day of——in the——year of the reign of——did put
 into and use, in the making of bread to be sold, a preparation
 or mixture in which allum was an ingredient, contrary to the
 form of the statute in such case made and provided: These are
 therefore to require you forthwith to summon the said A. O.
 to appear before me at——on the——day of——at the hour
 of——in the forenoon of the same day, then and there to an-
 swer to the said information: And be you then there, to cer-
 tify what you shall have done in the premisses. Herein fail
 you not. Given under my hand and seal, the——day of
 ——in the year aforesaid,

If the party shall not appear on such summons, or offer some reasonable excuse for his default ; then on oath made of the offence by one witness, such justice shall issue his *warrant* (*mutatis mutandis*) to apprehend the offender, and bring him before the said justice, to answer to the said information.

On the party's appearance ; or if he do not appear, then on proof of the summons being given to him or left at his usual place of abode ; or if he cannot be apprehended by warrant as aforesaid ; the justice may proceed to hear and determine the offence.

The form of the conviction, by the words of the statute, shall be as follows.

Westmorland, **B**E it remembred, that on this—--day to wit. **B** of—--in the—--year of the reign of—--A. O. is convicted before me J. P. esquire, one of his majesty's justices of the peace for the said county, for putting into and using in the making of bread to be sold, a preparation or mixture in which allum was an ingredient : And I do adjudge him to pay and forfeit for the same, the sum of five pounds. Given under my hand and seal the day and year aforesaid.

Warrant of distress, on non-payment of the penalty within 24 hours after the conviction.

Westmorland. { To the constable of—--.

FOrasmuch as A. O. late of—--in the county aforesaid, baker, was on the—--day of—--duly convicted before me J. P. esquire, one of his majesty's justices of the peace for the said county, by the oath of A. W. a credible witness, for that he the said A. O. on the—--day of—--did put into and use, in the making of bread to be sold, a preparation or mixture in which allum was an ingredient, against the form of the statute in such case made and provided ; by reason whereof, I did adjudge and have adjudged him to pay and forfeit for the said offence the sum of 5*l.* to be distributed as is herein after mentioned : And whereas it appears to me, that the said sum, or any part thereof, is not yet paid : I do therefore hereby authorize and require you forthwith to make distress of the goods and chattels of him the said A. O. and ; within the space of five days next after such distress by you taken

taken, the said sum of 5*l.* shall not be paid, that then you do cause the said goods by you seized to be appraised and sold; rendring the overplus to him the said A. O. after deducting the said sum of 5*l.* and also the costs and charges of the prosecution for the said offence, and of the said distress and sale; which costs and charges I do hereby ascertain at the sum of 30*s.* And out of the said sum of 5*l.* so forfeited as aforesaid, you are to pay one moiety to A. I. yeoman, who informed me of the said offence, and prosecuted to conviction him the said A. O. before me for the same; and the other moiety you are to apply for the better carrying the act of parliament for the due making of bread and for the other purposes therein mentioned into execution, according as I shall hereafter give you directions: And if sufficient distress cannot be had or found whereupon to levy the said sum of 5*l.* as aforesaid, you are hereby required to certify the same to me together with the return of this precept. Herein fail you not. Given under my hand and seal, the — day of — in the — year of the reign of —.

Return of the want of distress, indorsed upon the warrant.

Westmorland. **I** A. C. constable of — in the said county, do hereby certify J. P. esquire, one of his majesty's justices of the peace for the said county, that by virtue of this warrant, I have made diligent search for the goods and chattels of the within mentioned A. O. and that I can find no sufficient goods and chattels of him the said A. O. whereon to levy the within mentioned sum of 5*l.* Witness my hand, the — day of — in the year —.

A. C.

Sworn before me the said justice,
the day and year aforesaid:

J. P.

Commitment for want of distress.

Westmorland. **{** To the constable of — in the said county, and to the keeper of the common gaol at — in the said county.

I Orasmuch as A. O. late of — in the county aforesaid, baker, was on the — day of — duly convicted before me J. P. esquire, one of his majesty's justices of the peace for the said county, by the oath of R. W. a credible witness, for that he the said A. O. on the — day of — did put into and use in the making of bread to be sold, a preparation or mix-

ture in which allum was an ingredient, against the form of the statute in that case made and provided; by reason whereof I did adjudge him to pay and forfeit for the said offence the sum of 5*l*. And whereas on the——day of——in the year aforesaid, I did issue my warrant to the constable of——to levy the said sum of 5*l*. by distress of the goods and chattels of him the said A. O. And whereas it appears to me, as well upon the oath of the said constable of——as otherwise, that he the said constable of——hath used his best endeavours to levy the said sum on the goods and chattels of the said A. O. as aforesaid, but that no sufficient distress can be found whereon to levy the same: Therefore I do hereby command you the said constable of——him the said A. O. to apprehend and safely convey to the said common gaol, and him to deliver to the keeper thereof aforesaid, together with this precept: And I do hereby command you the said keeper of the gaol aforesaid, to receive into your custody in the said gaol him the said A. O. and him there safely to keep for the space of one kalendar month from the time of this commitment; unless the said sum of 5*l*. and also the costs and charges of the prosecution which I have ascertained at the sum of——shall be sooner paid. Given under my hand and seal, the——day of——in the year aforesaid.

B. The like process as above may be for bread deficient in weight; beginning the information, which is the groundwork of the whole, thus:

THAT A. O. late of——in the county aforesaid, baker, on the——day of——in the——year of the reign of——did expose to sale one loaf of household bread importing to be a two-penny loaf, deficient in weight one ounce, according to the assize then and there set for the said bread:

And so in other like cases.

Breaking gaol. See *Prison breaking*.

Breaking open doors. See *Arrest*.

Brewers. See *Excise*.

Bribery.

BRIBERY in a strict sense is taken for a great imprisonment of one in a judicial place, taking any thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the common law by fine and imprisonment. *1 Haw. c. 67.*

Bridges.

NOTE; This title treateth only of county bridges: Those which are under the cognizance of the surveyor of the highways, as being repaired by the several parishes or districts, are treated of under the title *Highways*.

- I. Who shall repair.*
- II. Power of the leet to inquire thereof.*
- III. Power of the justices in sessions.*
- IV. Concerning the 300 foot at the end of bridges.*
- V. Indictment of bridges.*
- VI. Charges of repairing.*
- VII. Surveyors of the work.*
- VIII. Manner of repairing.*
- IX. Purchasing lands adjoining.*
- X. Contracting for a term of years.*

I. Who shall repair.

1. By the great charter, 9 H. 3. c. 15. *No town nor freeman shall be distrained to make bridges nor banks, but such as of old time and of right have been accustomed.*

2. And none can be compelled to make new bridges, where never any were before, but by act of parliament. *2 Inst. 701.*

3. By the common law, some persons (spiritual or temporal, corporate or not corporate) are bound to repair

bridges by reason of the *tenure* of their lands or tenements ; and some by reason of *prescription* only :

By *tenure*, by reason that they and those whose estate they have in the lands or tenements, are bound in respect thereof to repair the same. 2 *Inst.* 700.

By reason of *prescription* only ; but herein there is a diversity between bodies politick or corporate, spiritual or temporal, and natural persons : for the bodies politick or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local and have a succession perpetual ; but a natural person cannot be bound by act of his ancestor, without a lien, or binding, and assets. 2 *Inst.* 700.

And if a man make a bridge for the common good of all the subjects, he is not bound to repair it ; for no particular man is bound to reparation of bridges by the common law, but by tenure or prescription. 2 *Inst.* 701.

4. And if none are bounden by tenure or prescription at common law, then the whole county or franchise shall repair it. 2 *Inst.* 701.

Concerning which, it is enacted by the 22 *H.* 8. c. 5. as follows : *Whereas in many places it cannot be known and proved, what hundred, town, parish, person, or body politick ought to repair bridges broken in the Highways ; in every such case, the said bridges, if they be without a city or town corporate, shall be made by the inhabitants of the county ; if within a city or town corporate, then by the inhabitants of such city or town corporate ; if part be in one shire, city or town corporate, and part in another, or part within the limits of a city or town corporate, and part without, the inhabitants of the shire, cities, or towns corporate, shall repair such part as lies within their limits.* s. 3.

Bridges broken in the highways.] This extendeth only to common bridges in the king's highways, and not to private bridges to mills, or the like ; the remedy in which case is not by indictment, but by action. 2 *Inst.* 701.

Within a city or town corporate] It hath been questioned, whether a borough which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 *Haw.* 225.

5. A tenant at will of an house, which adjoins to a common bridge, is bound to repair the house, so that the publick be not prejudiced by the want of repair, although he be not bound to repair as to his landlord. *L. Raym.* 856.

6. The

6. The freehold of bridges is in him that hath the freehold of the soil; but the free passage is for all the king's liege people. 2 *Inst.* 705.

II. Power of the leet to inquire thereof.

Decays of bridges are presentable in the leet, or torn. 2 *Inst.* 701.

III. Power of the justices in sessions.

The justices, or four of them at the least (1 Q.) shall have power to inquire, hear and determine in the general sessions, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment, against such as ought to be charged to make or amend them, as the king's bench usually doth, or as it shall seem by their discretions to be necessary and convenient, for the speedy amendment of such bridges. 22 H. 8. c. 5. s. 1.

Four of them at the least] If the bridge be within a franchise, which hath not four justices, and a sessions of its own, the justices of the county shall inquire: but if the franchise be a county of itself, and hath not four justices (1 Q.) it is not within this statute, but is left to the remedy which it had at common law. 2 *Inst.* 702.

And to make process] Where the bridge is in one shire, and the persons or lands which ought to be charged are in another shire; or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city, or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission: and if the annoyance be presented, then to make process into every shire of the realm, against such as ought to repair the same, and to do further in every behalf as they might do, if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is. 22 H. 8. c. 5. s. 5.

As the king's bench usually doth] The presentment at common law, might be before the king's bench, or at the assizes. 2 *Inst.* 701.

IV. Concerning the 300 foot at the ends of bridges.

Such part and portion of the highways, as well within franchises as without, as lie next adjoining to any ends of any bridges, distant from any of the said ends by the space of 300 foot, shall be made, repaired, and amended as often as need shall require; and the justices, or four of them (1 2.) shall have power to inquire, hear and determine, in the general sessions, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges, distant from any one of the ends of such bridges 300 foot, and to do in every thing concerning the making, repairing, and amending of such highways, in as ample manner as they may do for the making, repairing, and amending of bridges. 22 H. 8. c. 5. f. 9.

V. Indictment of bridges.

1. No money shall be applied to the repair of bridges, until presentment be made by the grand jury at the assizes or sessions, of their insufficiency, inconveniency, or want of reparation. 12 G. 2. c. 29. f. 13.

2. An indictment for not repairing a bridge, ought to shew what sort of a bridge it is, whether for carts and carriages, or for horses, or for footmen only. L. Raym. 1175.

3. If a man be indicted for that by reason of the tenure of certain lands he is bound to repair a bridge, it must be alledged where those lands lie. 2 H. H. 181.

4. Any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court, for the default of repairs, and shall be put to his remedy at law for a contribution from those, who are bound to bear a proportionable share in the charge; for the necessity of the case requires the greatest expedition in cases of this nature. 1 Haw. 221.

5. It hath been resolved, that it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves, by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same; and it is said, that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea. 1 Haw. 221.

6. It seemeth, that no inhabitant of a county ought to be a juror, for the trial of an issue, whether the county be bound to such repairs or not; and therefore the jury must come from some adjacent county; but by the statute of 1 Ann. st. 1. c. 18. such inhabitant may be a good witness. 1 Haw. 222.

7. No fine, issue, penalty, or forfeiture, upon any presentment or indictment for not repairing bridges, or the highways at the ends of bridges, shall be returned into the exchequer, but shall be paid to the treasurer, to be applied towards the said repairs, and not otherwise. 1 Ann. st. 1. c. 18. s. 4.

8. And no presentment or indictment for not repairing bridges, or highways at the ends of bridges, shall be removed by certiorari out of the county into another court. 1 An. st. 1. c. 18. s. 5.

But a *certiorari* lies to remove an order made by the justices, concerning the repair of a bridge, pursuant to a private act of parliament; and the justices ought to return the private act upon which their order is founded. Dalt. 504.

E. 4 G. 2. K. and the inhabitants of *Handsworth*. Upon motion to quash a *certiorari* to remove an indictment against the defendants at sessions, for not repairing a bridge; it was insisted, that by the 1 An. c. 18. the *certiorari* is taken away. To which it was answered, and resolved by the court, that this act extended only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the act of the 5 & 6 W. c. 11. had allowed the granting a *certiorari*. And therefore they refused to quash. Str. 900.

VI. Charges of repairing.

By the 12 G. 2. c. 29. The charges of repairing and amending bridges, and highways at the ends of bridges, shall be paid out of the general county rate. s. 1.

VII. Surveyors of the work.

The four justices in sessions as aforesaid may appoint two surveyors, with salaries, to see the bridges amended. 22 H. 8. c. 5. s. 4.

And this business of surveying the bridges, for the more convenience, is usually annexed by the justices to the office of the high constables; for which they have by this clause power to allow them salaries.

VIII. Manner of repairing.

1. It seemeth to be clear, that those who are bound to repair bridges, must make them of such height and strength, as shall be answerable to the course of the water, whether it continue in the old channel, or make a new one. 1 *Haw.* 221.

2. And persons are not trespassers, for entering on any adjoining lands for repairing bridges, or laying thereon the requisite materials. 1 *Haw.* 221.

IX. Purchasing lands adjoining.

The justices at their sessions may purchase any parcel of land, adjoining or near to any county bridge, for the more commodious enlarging, or convenient rebuilding the same, not exceeding one acre, to be paid for by the treasurer out of the county rates, by order under the hands and seals of the said justices in their said sessions; which lands so purchased, shall be conveyed to such person or persons as the justices in the said sessions shall appoint, in trust, for enlarging or rebuilding the said bridges. 14 *G.* 2, c. 33.

X. Contracting for a term of years.

By the 12 *G.* 2. c. 29. s. 14. When any publick bridges, ramparts, banks, or cops, are to be repaired at the expence of the county, the justices at their general or quarter sessions, after presentment made by the grand jury of their want of reparation, may contract with any person for rebuilding, repairing, and amending the same, for any term not exceeding seven years, at a certain annual sum.

In order to which they shall give publick notice of their intention of contracting with any person, for rebuilding, repairing, and amending the same.

And such contracts shall be made at the most reasonable price which shall be proposed by the contractors; who shall give sufficient security for the due performance thereof, to the clerk of the peace.

And all contracts when agreed to, and all orders relating thereto, shall be entered in a book to be kept by the clerk of the peace for that purpose; who shall keep the same amongst the records of the county, to be inspected by any of the justices at all seasonable times, and by any person

son employed by any parish or place contributing to the same without fee.

Indictment for a bridge out of repair.

BY the oaths of ——— good and lawful men of the county aforesaid, then and there sworn and charged to inquire for our said lord the king, and the body of the county aforesaid, it is presented, that a certain common bridge, over the river ——— commonly called ——— bridge, lying and being in the parish of ——— in the county aforesaid, in the king's common highway there, leading from the market town of ——— to the market town of ——— in the said county, altogether and from the time whereof the memory of man is not to the contrary, being a common king's highway for all the lieges and subjects of our said lord the king and of his ancestors, with their horses, carts, and carriages to go, pass, ride, and travel at their pleasure, on the ——— day of ——— in the ——— year of the reign of ——— was, and yet is in great decay, broken, and ruinous, so that the lieges and subjects of our said lord the king, upon and over the said bridge with their horses, carts, and carriages could not and cannot go, pass, ride, and travel, without great danger, to the grievous damage and nuisance of all the lieges and subjects of our said lord the king, upon and over the same bridge going, passing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity.

And that A. O. late of ——— in the said county, gentleman, by reason of his tenure of certain lands lying in the parish of ——— aforesaid, and elsewhere in the said county, ought to make, repair, and amend the said common bridge, as often as and when it shall be necessary.

[Or, And that the inhabitants of the county aforesaid, the common bridge aforesaid (so as aforesaid being in decay) ought to repair and amend, when, and so often as it shall be necessary.]

Buggery.

I. BUGGERY (from the Italian *bugarone*, a buggerer, What it is. this vice being said to have been brought into England out of Italy by the Lowbards) is a detestable and abominable sin, amongst christians not to be named, committed by carnal knowledge, against the ordinance of the creator, and

Buggery.

- and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast. 3 *Inst.* 58.
- The punishment.** 2. And by the statute of 25 *H. 8. c. 6.* Buggery committed with mankind or beast is made felony without benefit of clergy. And the justices of the peace may hear and determine the same, as in cases of other felonies.
- Principal and accessory.** 3. Which said statute making it felony generally, there may be accessaries both before and after. But those that are present, aiding and abetting, are all principals. And altho' none of the principals are admitted to their clergy, yet accessaries before and after are not excluded from clergy. 1 *H. H.* 670.
- Infants.** 4. If the party buggered be within the age of discretion (which is generally reckoned the age of 14), it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of discretion, it is felony in them both. 3 *Inst.* 59. 1 *H. H.* 670.
- Navy.** 5. By the articles of the navy (22 *G. 2. c. 33.*) if any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy, with man or beast; he shall be punished with death by the sentence of a court martial.
- Pardon.** 6. This crime is excepted out of the act of general pardon of the 20 *G. 2. c. 52.*

Bullion. See *Coin.*

Burglary.

Offences against the house of another, which fall short of burglary, belong to title *Larceny*, under the head *Larceny from the house.*

I. What is burglary.

II. Reward for convicting a burglar.

I. What is burglary.

Derivation of burglary.

1. **T**HE word *burglar* seemeth to have been brought unto us out of *Germany* by the *Saxons*, and to be derived of the German *burg*, a house, and *larron*, a thief, probably from the Latin, *latro*, *latronis*.

2. Burglary

2. Burglary is a felony at common law, in breaking and entering the mansion house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. *Hale's Pl. 79.* Definition of burglary.

—*Breaking*] Every entrance into the house by a trespasser, is not a breaking in this case; but there must be an actual breaking. As if the door of a mansion house stand open, and the thief enter, this is no breaking. So it is if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. *3 Inst. 64.*

And Lord *Hale* says, these acts amount to an actual breaking; opening the casement or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. *1 H. H. 552.*

At a meeting of the judges upon a special verdict, in *January 1690*, they were divided upon the question, whether breaking open the door of a cupboard let into the wall of the house was burglary or no. Concerning which, *Sir Michael Foster* says, with regard, to cupboards, presses, lockers, and other fixtures of the like kind; it seemeth, that, in favour of life, a distinction ought to be made between cases relative to mere property, and such where-in life is concerned. In questions between the heir or devisee and the executor, those fixtures may with propriety enough be considered as annexed to, and parts of the freehold. The law, will presume, that it was the intention of the owner, under whose bounty the executor claimeth that they should be so considered; to the end that the house might remain to those, who by operation of law, or by his bequest, should become intitled to it, in the same plight he put it or should leave it, intire and undefaced. But in capital cases, it seemeth, that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use. *Pest. 108, 9.*

M. 8 G. K. and Gray. One of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape; and it was

ruled

ruled to be burglary, and the defendant was convicted and transported. *Str.* 481.

By the statute of the 12 *An. c.* 7. If any person shall enter into the mansion house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall in the night time break the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entered the house in the night time, with intent to commit felony.

M. 4 G. 2. Joshua Cornwall's case. He was indicted with another person for burglary. And upon the evidence it appeared, that he was a servant in the house, where the robbery was committed, and in the night time opened the street door, and let in the other prisoner, and shewed him the side-board, from whence the other prisoner took the plate: then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted, whether this was burglary in the servant, he not *going out* with the other. But afterwards at a meeting of all the judges at *Serjeants-inn*, they were all of opinion that it was burglary in both, and not to be distinguished from the case where one watches at the street end, whilst another goes in and commits the burglary, which hath been often ruled to be burglary in both: and upon report of this opinion the defendant was executed. *Str.* 881.

And entering] It is deemed an entry, when the thief breaketh the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, or into a hole of the house which he hath made of intent to murder or kill; this is an entry and breaking of the house: but if he doth barely break the house, without any such entry at all, this is no burglary. 3 *Inst.* 64.

In the case of *George Gibbons*, at the *Old Baily* in *June 1752*; *Gibbons* was indicted for burglary in the dwelling house of *John Allen*. It appeared in evidence, that the prisoner in the night time cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling house; and putting his hand thro' the hole, took out watches and other things, which hung in the shop within his reach: but no entry was proved, otherwise than
by

by putting his hand thro' the hole. This was held to be burglary, and the prisoner was convicted. *Fest.* 107, 8.

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch, at a distance, this is burglary in all. 3 *Inst.* 64.

The mansion house] This includes also churches, and the walls or gates of a walled town. 1 *Haw.* 103.

Mr. *Hawkins* says, all out-buildings, as barns, stables, dairy houses, adjoining to a house, are looked upon as part thereof; and consequently burglary may be committed in them: but if they be removed at any distance from the house, it seems that it hath not been usual of late to proceed against offences therein as burglaries. 1 *Haw.* 104.

And lord *Hale* says more explicitly, the mansion house doth not only include the dwelling house, but also the outhouses that are parcel thereof, as barn, stable, cow house, dairy house, if they are parcel of the messuage, tho' they are not under the same roof, or joining contiguous to it; and so, he says, it was agreed by all the judges: but if they be no parcel of the messuage, as if a man take a lease of a dwelling house from one, and of a barn from another; or if it be far remote from the dwelling house, and not so near to it as to be reasonably esteemed parcel thereof, as if it stand a bow-shot off from the house, and not within or near the curtilage of the chief house, then the breaking it is not burglary, for it is not a mansion house, nor any part thereof. 1 *H. H.* 558, 9.

To break and enter a *shop*, not parcel of the mansion house, in which the shopkeeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion house, in which a burglary may be committed. 1 *H. H.* 557, 8.

It is not necessary, to make it burglary, that any person be actually in the house, at the very time of the offence committed.

At *Newgate* session, *John Nutbrown*, burglar, and *Miles Nutbrown*, burglar, were indicted for breaking and entering the dwelling house of *John Nutbrown*, burglar, and stealing divers goods. *John Nutbrown*, burglar, was charged that he held this house as his chief residence being

end of the last summer, he removed with his whole family to his house in the city, and brought away a considerable part of his goods: That in *November* last, his house was broke open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed, or kitchen furniture, or any thing else for the accommodation of a family. Mr. *Fakney*, being asked, whether at the time he so disfurnished his house, he had any intention of returning to reside there, declared that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The fact the prisoners were charged with was sufficiently proved; and was committed about midnight the first of *January* last. The court was of opinion, that the prosecutor having left his house, and disfurnished it in the manner beforementioned, without any settled resolution of returning, but rather inclining to the contrary, it could not, under these circumstances, be deemed his dwelling house, at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary, which they did, but found them guilty of felony in stealing the clock and some other small matters. And they were ordered for transportation. — And the distinction is this: Where the owner quitteth the house, *animo revertendi*, it may still be considered as his mansion house, tho' no person be left in it; many citizens, and some lawyers, do so from a principle of good husbandry, in the summer, or for a long vacation. But there must be an intention of returning, otherwise it will be no burglary. *Fest.* 76, 77.

In the night] As long as the day continues, whereby a man's countenance may be discerned, it is called day; and when darkness comes, and day light is past, so as by the light of day you cannot discern the countenance of a man, then it is called night. 3 *Inst.* 63.

And this doth aggravate the offence; since the night is the time wherein man is at rest, and wherein beasts run about seeking their prey. Hence in ancient records, the twilight was signified, when it was said, *inter canem & lupum* (between the dog and the wolf); for when the night begins, the dog sleeps, and the wolf seeketh his prey. 3 *Inst.* 63.

With intent to commit felony] There can be no burglary, but where the indictment both expressly alledges, and the verdict

verdict also finds, an intention to commit some felony; for if it appear, that the offender meant only to commit a trespass, as to beat the party, or the like, he is not guilty of burglary. 1 *Haw.* 105.

However, it seems the much better opinion, that an intention to commit a rape, or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law; because where ever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. 1 *Haw.* 105.

Whether the felonious intent be executed or not] Thus they are burglars, who break any house, or church, in the night, altho' they take nothing away. And herein this offence differs from robbery, which requires that something be taken, tho' it is not material of what value.

Where a man commits burglary, and at the same time steals goods out of the house, it is also larceny; and if he be acquitted of the burglary, he may notwithstanding be indicted of the larceny; for they are several offences, tho' committed at the same time. And burglary may be, where there is no larceny; and larceny may be, where there is no burglary. 2 *H. H.* 246.

3. By the 18 *El. c.* 7. and 3 *W. c.* 9. Benefit of clergy Punishment is taken away in cases of burglary, both from the principal, and the accessary before; but in all cases of burglary, accessaries after must have their clergy. 2 *H. H.* 364. 1 *Haw.* 357, 8.

4. All burglaries and robberies of churches are excepted Pardon. out of the general pardon of the 20 *G. 2. c.* 52.

II. Reward for convicting a burglar.

1. It may be observed, in the first place, that it is provided by the 24 *H. 8. c.* 5. that there shall be no forfeiture of lands or goods, for killing any person that attempts to commit burglary. Indemnity for killing him.

But besides this indulgence to a person killing such an offender in defence of his house, there are special advantages and rewards for apprehending and convicting him in due course of law; which are as follows:

2. By the 25 *G. 2. c.* 36. The charges of prosecuting and convicting a burglar, shall be paid by the treasurer of the county where the burglary was committed, on producing to him the order of the court for that purpose, Charges of convicting him to be reimbursed. which

which the clerk of assize, or of the peace, shall make out, for the fee of 1 s. *f. 11.*

And also the charges of poor witnesses appearing on their recognizance, by the 27 G. 2. c. 3. on paying 6 d. for the order : except in *Middlesex*, where the same shall be paid by the overseers of the poor where the person was apprehended.

Exemption from
parish offices for
taking and con-
victing him.

3. Every person who shall apprehend any one guilty of burglary and prosecute him to conviction, shall have a certificate, without fee, under the hand of the judge, certifying such conviction, and within what parish or place the burglary was committed, and also that such burglar was discovered and taken, or discovered or taken, by the person so discovering or apprehending; and if any dispute arise between several persons so discovering or apprehending, the judge shall appoint the certificate into so many shares to be divided among the persons concerned, as to him shall seem just and reasonable.

And if any person shall happen to be slain by such burglar, in endeavouring to apprehend him, the executors or administrators of such person slain shall have the like certificate :

Which certificate shall be inrolled by the clerk of the peace of the county in which it shall be granted ; for which he shall have 1 s. and no more :

And the said certificate may be once assigned over ; and the original proprietor, or the assignee of the same, shall by virtue thereof be discharged from all manner of parish and ward offices, within the parish or ward where the felony was committed. 10 & 11 W. c. 23.

40 l. for taking
and convicting.

4. And moreover, as a further reward, every person who shall apprehend any person guilty of burglary, and prosecute him to conviction, shall have a certificate under the hand of the judge, without fee, to be made out and delivered before the end of the assizes, certifying the conviction, and in what parish the burglary was committed, and also that the burglar was taken by the person claiming the reward ; and if any dispute shall happen to arise between the persons claiming, the judge shall by the said certificate appoint the same to be paid amongst the parties claiming the same, in such share and proportion as to him shall seem just and reasonable :

And on tender of such certificate to the sheriff, and demand made, he shall pay to the person so intitled, the sum of 40 l. without fee or deduction, within one month after such tender and demand ; on pain of forfeiting double, with treble costs. 5 An. c. 31. 6 G. c. 23. *f. 10.*

5. And

5. And if any watchman, or any other person, be killed, ^{40 l. to the executor of a person killed.} in endeavouring to apprehend any such burglar, his executors or administrators shall have a certificate delivered under the hand and seal of the judge, or of the two next justices of the peace, of such person being so killed; which certificate they shall, on sufficient proof before them made, give without fee: whereupon, such executor or administrator shall be intitled to receive the like sum of 40 l. in like manner. 5 *An. c. 31. s. 2.*

6. And moreover, if any person, being out of prison, shall commit any burglary, and afterwards discover two or more the like offenders, so as two or more be convicted; he shall have the like reward and allowance of 40 l. and also all other advantages which are given to persons who shall apprehend and convict any the like offenders; and shall also have the king's pardon for all burglaries, robberies, and felonies (except murder and treason) by him committed before such discovery made; which pardon shall be likewise a good bar to an appeal. 5 *An. c. 31. s. 4.* ^{40 l. and a pardon, for convicting two accomplices.}

7. And the sheriff, on producing the certificates, and receipts for the said rewards, may deduct the same on his accounts; and if he have not money in his hands, he shall be repaid out of the treasury, on certificate from the clerk of the pipe. 5 *An. c. 31. s. 3.* ^{Sheriff how to be repaid.}

Or instead of charging the same in his accounts, he may immediately apply to the commissioners of the treasury, who shall forthwith repay the same without fee. 3 *G. c. 15. s. 4.*

Warrant to apprehend a burglar.

Westmorland. { To the constable of——

FORASMUCH as A. I. of——in the county of——ycoman, hath this day made information and complaint upon oath, before me J. P. esquire, one of his majesty's justices of the peace for the said county, that yesterday in the night the dwelling house of him the said A. I. at——aforesaid in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of 5 l. of the goods and chattels of him the said A. I. feloniously and burglariously stolen, taken, and carried away from thence; and that he hath just cause to suspect, and doth suspect, that A. O. late of——in the county of——labourer, the said felony and burglary did commit: These are therefore, in his said majesty's

Burglary.

name to command you, that immediately upon sight hereof you do apprehend the said A. O. and bring him before me to answer the premisses, and to be farther dealt withal according to law. Herein fail you not. Given under my hand and seal the ——— day of ——— in the year ———.

Indictment for proper burglary.

Westmorland. **T**HE jurors for our lord the king upon their oath present, That A. O. late of ——— in the county of ——— labourer, on the ——— day of ——— in the ——— year of the reign of ——— at the hour of one in the night of the same day, with force and arms, at ——— in the county of ——— the dwelling house of A. I. feloniously and burglariously did break and enter, with intent him the said A. I. of his goods in the same dwelling house then being, feloniously and burglariously to spoil and rob, and the same goods feloniously and burglariously to steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Indictment for burglary and larceny.

Westmorland. **T**HE jurors for our lord the king upon their oath present, That A. O. late of ——— in the county of ——— labourer, on the ——— day of ——— in the ——— year of the reign of ——— betwixt the hours of ten and eleven in the night of the same day, with force and arms, at ——— in the county of ——— the dwelling house of A. I. feloniously and burglariously did break and enter, and one silver tankard of the value of 5 l. of the goods and chattels of him the said A. I. in the same dwelling house then and there feloniously and burglariously did steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Burning.

House-burning
is the common
law.

1. **M**aliciously and voluntarily burning the house of another, by night or by day, is felony at the common law. 1 Haw. 105.

[Maliciously and voluntarily] For if it be done by mischance or negligence, it is no felony. 3 Inst. 67.

Yet

Yet if a man maliciously intending only to burn one person's house, happens thereby to burn the house of another, it is certain that he may be indicted as having maliciously burned the house of that other; for where a felonious design against one man misseeth its aim, and takes effect upon another, it shall have the like construction as if it had been levelled against him who suffers by it. 1 *Haw.* 106.

Burning] Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to a part of a house, will amount to felony, if no part of it be burned; but if any part of the house be burnt, the offender is guilty of felony, notwithstanding the fire afterwards be put out, or go out of it self. 1 *Haw.* 106.

The house] Not only a mansion house, and the principal parts thereof, but also any other house, and the out-buildings, as barns and stables adjoining thereto; and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the malicious burning of them is felony at common law. 1 *Haw.* 105.

Of another] Mr. *Hawkins* says, A person seised in fee, or but possessed for years, of a house standing by itself at a distance from all others, cannot commit felony in burning the same: Also, that it seems the much stronger opinion, that a man so seised or possessed of a house in a town, who burns his own with an intent to burn his neighbour's, but in the event burns his own only, is not guilty of felony; but however it is certainly an offence highly punishable, in regard of the malice thereof, and the great danger to the publick which attends it; and the offender may be severely fined, and imprisoned during the king's pleasure, and set on the pillory, and bound to his good behaviour. 1 *Haw.* 106.

And so it was in *Holmes's* case, *M. 10 Cha.* *Holmes* was indicted at *Newgate* sessions, and convicted, for that he, being possessed of a house in *London* for six years, remainder to another for three years, reversion to the corporation of *Huberdashers* in fee, did burn the said house. And the indictment being removed into the king's bench by certiorari, it was held by three justices, against the opinion of *Croke* justice, that it was not felony to burn a house whereof he was in possession by virtue of a lease for years. For they said, the burning of a house is not felony, unless it be the house of another. Wherefore he was

discharged of the felony. But because it was an exorbitant offence, they ordered, that he should be fined 500 l. to the king, and imprisoned during the king's pleasure; and should stand upon the pillory, with a paper upon his head signifying the offence, at *Westminster*, and at *Cheapside*, upon the market day, and in the place where he committed the offence; and should be bound to his good behaviour during life. *Cro. Car.* 376.

In the case of of *Elizabeth Harris*, at *Aylesbury*, Lent assizes 1753, before Mr. justice *Denison*; *Elizabeth Harris*, a girl of 14 years of age, and of sufficient understanding for her years, was indicted for maliciously setting fire to and burning a dwelling house, in the possession of *Edward Stokes*: and *Anne*, the wife of *William Course*, was indicted as an accessory to the felony before the fact. The prisoner *Elizabeth Harris* was the daughter of the prisoner *Anne* by a former husband, *John Harris*. It appeared in evidence at the trial, that *John Harris* died seized of the equity of redemption of this house and of another adjoining to it, subject to a mortgage term for 20 l. And that the equity descended to his eldest son, a child left with other children under the care of their mother the prisoner *Anne*; who was intitled to dower out of these houses, but no dower was ever assigned: That *Anne*, having the care of her son and his estate, let these houses to *Edward Stokes* at the rent of 5 l. a year, and received the rent for some time; but having a large family of children, she was obliged to ask relief of the parish where she lived: That she was denied such relief, on account of these houses; the parishioners insisting, that the overseers of the poor should be let in to the receipt of the rent, before she should be intitled to any parochial relief: That thereupon she frequently declared, she would set the housing on fire, if the parish did not relieve her; that she had young children, whom the parish could not punish, tho' they might punish her; and she would order the least child she had who could carry a coal of fire, to burn the housing down: And many other declarations of the like kind she made, which discovered an obstinate resolution in her to burn the houses, rather than submit to the terms the parishioners insisted on. It appeared farther, that the prisoner *Elizabeth* set the house on fire by the direction of her mother the prisoner *Anne*, who went from home on purpose to be absent at the time the fact was committed; and that no other house was burnt.—The jury found both the prisoners guilty. But a doubt arising by reason of the interest the prisoner *Anne* had in the house,

house, Mr. justice *Denison* thought proper to respite judgment, in order to take the opinion of the judges on the case.—*July 2d, 1753*, at a meeting of the judges, it was unanimously agreed, that both the prisoners are guilty of felony. The only doubt was, with regard to the interest the prisoner *Anne* had in the house; and it was grounded on the reasoning in *Holmes's* case: for had she had such estate in the house as would have cleared her of the charge of felony; the prisoner *Elizabeth*, who acted by her directions, could not have been guilty of felony.—But all the judges agreed, that the prisoner *Anne's* title to dower was not such an interest as could bring her within the rule in *Holmes's* case. *Holmes* had the possession by legal title, and during the continuance of his lease could maintain his possession against all mankind; and therefore the house might in a limited sense be called *his own*. But in the present case, the possession was in *Edward Stokes*, under a demise from *Anne* in behalf of her son, and subject to a yearly rent which she received. And her title to dower, had *Edward Stokes's* interest been out of the case, did not so much as give her a right of entry, it being a bare right of action. Mr. justice *Denison* said, that he had no doubt upon him from the beginning. But it being a new case, and some of the bar being doubtful, he thought it advisable to take the opinion of the judges. —At the next assizes, judgment of death was pronounced upon both the prisoners; and *Anne* the mother was executed. But *Elizabeth* being young, and acting under her mother's direction, was reprieved, and recommended to mercy on condition of transportation.—It was said in the debate of this case by some of the judges, and not denied by any, that had *Anne* been seized of the freehold and inheritance of the house, and *Stokes* in possession under a lease, it would have been felony in *Anne* to have burnt it: otherwise all tenants and their concerns would be very much at the mercy of their landlords. And the principle the three judges went upon in *Holmes's* case, doth seem to warrant this opinion. They considered the house then under consideration as the property of *Holmes*, as *his own house*, by reason of the estate he had in it under his lease. *Croke* (who differed from them) did not dispute the principle, but argued against the conclusion the other judges drew from it. And if this be so, Mr. justice *Foster* says, he does not see why it may not with strict legal propriety be said of a reversioner, who should maliciously set fire to houses in the possession of his tenants under leases from himself or his

ancestors, that he burned the *houses of another*. The judgment in *Holmes's* case, to say no more of it, was a very merciful judgment. The house might with strict legal propriety have been considered as the house of the landlord. Both landlord and tenant have a property, one temporary and limited, the other absolute and perpetual; like the person to whom goods are delivered, and the absolute owner thereof, in the case of larceny.——Note, it was stated in this case, that the daughter, who committed the fact at the instigation of the mother, was *of the age of 14, and of sufficient discretion*. But if the mother had employed, as she threatened she would, the least of her children; then *she* must have been indicted as the principal, since the child not being of years of discretion was innocent. *Fost. 113, 349.*

By Statute:
Burning a dwelling
house, life or
death burn.

2. By the statutes of 23 *H. 8. c. 1.* and 25 *H. 8. c. 3.* No person who shall be found guilty for wilful burning of any dwelling house, or barn wherein any corn shall be, nor persons abetting, procuring, helping, maintaining, or counselling the same shall be admitted to the benefit of clergy.

There hath been much learned debate, how far these statutes, which are repealed by 1 *Ed. 6. c. 12.* are revived by 5 & 6 *Ed. 6. c. 10.* But as the same is enacted in effect by other subsequent statutes, it is now not very material.

By the 4 & 5 *P. & M. c. 4.* Every person who shall maliciously command, hire, or counsel any person, wilfully to burn any dwelling house, or any part thereof, or any barn then having corn or grain in the same, shall not have the benefit of his clergy.

But accessaries after shall have their clergy. 1 *H. H.*

573.

Burning a barn,
or stack of corn,
in the northern
counties.

3. Whoever shall wilfully and of malice burn, or cause to be burned, or aid, procure, or consent to the burning of any barn, or stack of corn or grain, within any of the counties of *Cumberland, Northumberland, Westmorland, and Duresme*, shall be guilty of felony without benefit of clergy. And justices of the peace in sessions may hear and determine the same. 43 *El. c. 13.*

Burning in the
night stacks of
corn or hay,
barns, houses,
kilns.

4. If any person shall in the night time, maliciously, unlawfully, and willingly burn, or cause to be burned or destroyed, any ricks or stacks of corn, hay, or grain, barns, or other houses or buildings, or kilns; he shall be guilty of felony, but without corruption of blood, or disinherittance of heirs:

And the judges of assize, or three justices of the peace (1 Q.) may determine the same, so that the prosecution be within six months :

And the said justices, on request of the party injured, shall issue their warrant for apprehending all such persons as shall be suspected thereof, and take their examination :

And shall cause all others who to them shall seem likely to make discovery, to appear before them, and give information on oath ; yet so, as no person to be examined shall be proceeded against for any offence, concerning which he shall be examined as a witness and shall upon his examination make a true discovery :

And if such witnesses, being duly summoned, shall refuse to appear, or to be examined, they may commit him to the common gaol, till he submit to be examined upon oath :

And they shall issue warrants for summoning jurors :

And if any person, being found guilty (in order to avoid judgment of death, or execution thereupon) shall make his election to be transported, the court shall cause judgment to be entered that he be transported to some of the plantations (to be mentioned in the judgment) for seven years ; and if he shall return before the expiration of the term, he shall suffer death as a felon, and as if no such election to be transported had been made by him. 22 & 23 C. 2. c. 7.

5. By the 9 G. c. 22. commonly called the Black act, Burning by the
Black Act. (which is inserted more at length under the title *Black act* ;) If any person shall set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood ; [And by the 10 G. 2. c. 32. §. 6. If any person shall wilfully and maliciously set on fire any mine, pit, or delf of coal or cannel coal ; which offence, by §. 4. of this act, is incorporated with the offences in the Black act] he shall be guilty of felony without benefit of clergy.

And the hundred shall be chargeable, as in cases of robbery, for the damages sustained (not exceeding 200l.)

And if any person shall apprehend, or cause to be convicted, any offender, and shall be killed, or wounded so as to lose an eye or the use of a limb in endeavouring to apprehend him ; on proof thereof made at the sessions, and on certificate thereof from thence, he shall be intitled to the sum of 50l. to be paid by the sheriff in 30 days, the same to be repaid to him out of the treasury.

And by the 20 G. 2. c. 52. All offences of setting fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, are excepted out of the general pardon.

Houseburning
not bailable.

6. Such as be taken for houseburning feloniously done, are not bailable by justices of the peace. 3 *Ed. 1. c. 15.* 2 *Inst.* 189.

Burning a ship.

7. If any ship officer shall wilfully burn the ship to which he belongeth, or procure the same to be done, to the prejudice of the owner of the ship or goods, he shall be guilty of felony without benefit of clergy. 1 *An. st. 2. c. 9.*

And by the articles of the navy, 22 *G. 2. c. 33.* Every person who shall unlawfully burn or set fire to any magazine, or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court martial. *Art. 25.*

Burning wood
growing.

8. If any person shall, by day or by night, in a riotous, open, tumultuous, or in a secret and clandestine manner, forcibly, or wrongfully and maliciously burn any wood, or springs of wood, or coppice wood, he shall be guilty of felony. 1 *G. st. 2. c. 48.* 6 *G. c. 16.*

And any two justices, or the justices in sessions, may cause the offender to be apprehended, and hear, and determine, and adjudge the offence. 6 *G. c. 16.*

But if the offender is not known, then the person injured shall have satisfaction from the inhabitants of the parishes, towns, or places joining thereon, in the same manner as for dikes and hedges overthrown in the night, by the statute of 13 *Ed. 1. c. 46.* (which enacts, that if it cannot be known by the verdict of assize or jury who did the fact, the towns near adjoining shall be distrained to levy the hedge at their own cost, and to yield damages) unless the offender be by such parish, town, or place, convicted in six months. 6 *G. c. 16.*

Burning ling,
goss, furze or
fern.

9. No person shall on any mountains, hills, heaths, moors, forests, chases, or other wastes, burn between *Feb. 2.* and *June 24.* any grig, ling, heath, furze, goss, or fern; on pain of being committed to the house of correction for any time not exceeding one month, nor less than ten days, there to be whipt, and kept to hard labour. 4 & 5 *W. c. 23. s. 11.*

Burning goss,
furze, or fern in
forests.

10. If any person shall set fire to, burn, or destroy any goss, furze, or fern, in any forest or chase without consent of the owner or person chiefly intrusted with the custody of such forest or chase, or of some part thereof, or shall be aiding therein, and being brought before a justice, shall be thereof convicted by confession, or oath of one witness, or on view of the justice, he shall forfeit not exceeding

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ing 5*l.* nor less than 40*s.* half to the informer, and half to the poor; if not forthwith paid, to be levied by distress; and if no sufficient distress can be found, the justice shall commit him to the common gaol for any time not exceeding three months, nor less than one month. 28 *G.* 2. c. 19. f. 3.

11. If any person shall maliciously, willingly, and unlawfully, burn or cause to be burnt, any wain or cart, laden with coals, or with any goods or merchandizes; or any heap of wood prepared, cut, or felled for making coals, billets, or talwood, he shall forfeit treble damages to the party grieved, to be recovered by action of trespass; and also 10*l.* as a fine to the king. 37 *H.* 8. c. 6. f. 4.

Burning a laden cart, or fire wood.

12. If any servant, thro' negligence or carelessness, shall fire or cause to be fired any dwelling house, or outhouse or houses, and be thereof convicted on the oath of one witness before two justices, he shall forfeit 100*l.* to the churchwardens of the parish where the fire shall happen, to be distributed by them to the sufferers, in such proportions as to them shall seem just; and if he do not pay the same immediately on demand of the churchwardens, the said justices shall commit him to some workhouse or house of correction for eighteen months, there to be kept to hard labour. 6 *An.* c. 31.

Punishment of a servant carelessly firing a house.

13. By the commission of the peace, any justice may cause to come before him, all those who to any of the people concerning the firing of their houses have used threats, to find sufficient security for the peace or their good behaviour towards the king and his people; and if they shall refuse to find such security, may cause them to be safely kept in the king's prisons, until they shall find such security.

Threatning to burn a house.

Burying in Woollen. See *Woollen Manufacture.*

Butchers.

1. **N**O person, using the trade of a butcher, shall sell, offer, or expose to sale, by himself or any other, any fat oxen, steers, runts, kine, heifers, calves, sheep, or lambs alive; on pain of forfeiting double value, half to the king, and half to him that will sue. 15 *C.* 2. c. 8.

Not to sell fat cattle alive.

2. If any butchers shall conspire not to sell their victuals but at certain prices; every such person shall forfeit for the first

Conspiring to raise the price of victuals.

first offence 10 l. to the king, and if not paid in six days, he shall suffer twenty days imprisonment, and shall only have bread and water for his sustenance; for the second offence 20 l. in like manner, or the pillory; and for the third offence 40 l. or pillory, and the loss of an ear, and to be taken as a man infamous, and not to be credited in any matter of judgment. And the sessions or leet may determine the same. 2 & 3 Ed. 6. c. 15.

Not to kill in
a walled town.

3. No butcher shall slay any beast within any walled town, except *Carlisle* and *Berwick*; on pain of forfeiting for every ox 12 d. every cow and other beast 8 d. half to the king, and half to him that will sue. 4 H. 7. c. 3.

Selling unwhol-
some flesh.

4. A butcher that selleth swine's flesh meazled, or flesh dead of the murrain, shall for the first time be grievously amerced, the second time suffer judgment of the pillory, the third time be imprisoned and make fine, and the fourth time forswear the town. Ordinance for bakers. *Hawk. Stat. V. 1. p. 181.*

Not to kill or
sell on the lord's
day.

5. If any butcher shall kill or sell any victual on the lord's day, he shall forfeit 6 s. 8 d. one third to the informer, and two thirds to the poor, on conviction before one justice, on his own view, or confession, or oath of two witnesses, to be levied by the constable or churchwarden. 3 C. c. 1.

Not to water
hides.

6. No butcher shall water any hide, except in *June*, *July*, and *August*; on pain of 3 s. 4 d. for each offence. 1 J. c. 22. f. 2. one third to the king, one third to the informer, and one third to the town or lord of the liberty. f. 46.

And the sessions or leet may hear and determine the same. f. 50.

Or, any two justices, near the place, may (in three months after the offence committed) summon the party accused, and the witnesses; and upon the party's appearance, or contempt in not appearing, on proof of notice given, may examine the witnesses on oath, and give judgment, and issue warrants under their hands to levy the penalty by distress; and, if not redeemed in six days, the same to be sold. They may also mitigate the penalties, so as they reduce them not to less than a fourth part, over and above the costs and charges. And any person aggrieved may appeal to the next sessions, who may finally determine the same; and, in case of conviction, issue warrants for levying the penalties. 9 An. c. 11. f. 36.

Selling rotten
hides.

7. No butcher shall put to sale any hide putrified or rotten; on pain of 3 s. 4 d. for each offence, in like manner. 1 J. c. 22. f. 2.

8. No butcher shall be a tanner or currier; on pain of 6 s. 8 d. a day, to be recovered and levied in like manner. Exercising the trade of a tanner.

1 *J. c. 22. f. 2, 25.*

9. If any raw hide shall wilfully or negligently be gashed, in the flaying thereof; or being gashed, be offered to sale by any butcher or other; the offender shall forfeit 2 s. 6 d. for such hide, and 1 s. for a calf skin; half to the poor, and half to the informer: To be levied by two justices in like manner. 9 *An. c. 11. f. 11.* Gashing hides.

Butter and cheese.

For licence to be a badger, lader, kiddler, carrier, buyer, or transporter coastwise, of butter and cheese; see the title **Badgers**.

I. Concerning the packing, weight, and goodness of butter.

II. Concerning ingrossing and regrating of butter and cheese.

III. Concerning the shipping of butter and cheese for London.

IV. Exporting of butter and cheese.

V. Importing of butter and cheese.

I. Concerning the packing, weight, and goodness of butter.

1. **E**VERY farmer and other person packing up butter for sale, shall set upon every firkin and cask, when the same is fully seasoned in water, a continuing visible mark of the just weight of the empty cask; on pain of forfeiting for every offence the sum of ten shillings for every hundred weight of butter otherwise packed, and so proportionably for a greater or lesser quantity; half to the churchwardens and overseers for the use of the poor, and half with double costs to him who shall sue for the same in sessions, by action of debt, indictment, information, or presentment. 13 & 14 *C. 2. c. 26. f. 5, 6.* Weight of the cask to be marked.

2. Also every potter shall set upon every pot which he shall sell for packing up butter, the just weight of the pot when it is burnt, together with the first letter of his christian Weight of a pot to be marked.

stian name, and his surname at length; on pain of 1 s. And no person shall expose to sale any butter packed up in any pot not so marked, on pain of 2 s. for every such pot. To be recovered and applied in like manner. 13 & 14 C. 2. c. 26. f. 6.

Weight and
goodness.

3. Every kilderkin of butter shall contain 112 pounds, and every firkin 56 pounds neat, or above: every pound containing 16 ounces, besides the tare of the cask, of good and merchantable butter; and every pot of butter shall contain 14 pounds neat, or above, besides the weight of the pot;

And no butter which is old or corrupt shall be mixed or packed up with any butter which is new and sound;

Nor any whey butter shall be packed or mixed with any butter made of cream;

And every cask or pot of butter shall be of one sort and goodness;

And no butter shall be salted with any great salt, but shall be salted and saved with small salt; nor more salt shall be intermixed with it than shall be needful for its preservation:

On pain that every owner, farmer, or packer of butter, not putting up in each kilderkin, firkin, and pot, to be sold or exposed to sale, such quantities as aforesaid, or offending in false packing as aforesaid, for every offence shall forfeit the value of all the butter so false packed; and for every offence where any kilderkin, firkin, or pot shall be found to contain a lesser quantity of butter than as above, six times the value of every pound of butter that shall be wanting in such cask or pot; to be recovered and applied as aforesaid. 13 & 14 C. 2. c. 26. f. 2.

Owner to set his
name on the
cask.

4. And when the farmer or other person hath filled the cask with butter, he shall, besides the former mark of the weight of the cask, set also on the cask the first letter of his christian name, and his surname at length with an iron brand; on pain of forfeiting for every offence the sum of 10 s. for every hundred weight of butter otherwise packed, and for more or less proportionably; to be recovered and applied in like manner. 13 & 14 C. 2. c. 26. f. 5.

Cheesemonger to
deliver due quan-
tity and quality.

5. And every cheesemonger and other who shall sell any kilderkin, firkin, pot, or other cask of butter, shall deliver therein the full quantity and due quality; or shall be liable to make satisfaction, according to the price thereof. 13 & 14 C. 2. c. 26. f. 3.

Cheesemonger
shall not repack
butter.

6. And no cheesemonger or other person shall repack for sale, any butter, in any kilderkin, firkin, or other cask, or pot, on pain of forfeiting double value thereof; to be

be recovered and applied in like manner. 13 & 14 C. 2.

c. 26. f. 4.

7. The prosecution for the offences above, shall be commenced in four months after the sale of the butter. 13 & 14 C. 2. c. 26. f. 7. In what time the prosecution shall be.

8. But provided nevertheless, that no seller of butter shall be charged with any of the said penalties, after the buyer hath bought the butter and approved it. 4 W. c. 7. Prosecution not to be, if the buyer hath approved it.
f. 2.

9. And for preventing any fraud in the seller, after the factor or buyer hath bought the butter, the said factor or buyer shall set his seal, or mark, or name upon it, or upon the cask; and if it shall be afterwards exchanged or opened, and the cask changed, or any bad butter mixed or packed up with good butter, or any other fraud be committed by the seller; and he be convicted thereof, before one justice, by oath of one witness, or confession, he shall forfeit 20s. for every firkin and offence, to be levied by the constable, by distress, and to be distributed by the justice, half to the churchwardens and overseers for the use of the poor, and half to the informer. 4 W. c. 7. f. 2. Fraud after sale, by the seller.

But any person aggrieved may appeal to the sessions, giving 20 l. bond to the party, to pay costs (in a month after) if he is not relieved on his appeal. *id.* f. 10.

II. Concerning ingrossing and regrating of butter and cheese.

There is nothing relating to the *forestalling* of butter and cheese, different from the forestalling of other goods; which may be seen under the general title of forestalling. But as to ingrossing and regrating the same, it hath been enacted as followeth:

1. By the 3 & 4 Ed. 6. c. 21. No person shall buy to sell again, any butter or cheese, unless he sell the same again by retail in open shop, fair, or market, (or victualers in their houses), and not in gross; on pain of double value, half to the king, and half to him that will sue. Not to be sold again, but by retail.

And the word *retail* shall be taken only where a weight of cheese (*viz.* 225 pounds, in some places 256, in others 336 pounds, *Dalt. c. 112.*) or a barrel of butter, or less quantity, and not above, shall be sold at any time to any person or persons.

2. And by the 5 & 6 Ed. 6. c. 14. Whosoever shall ingross or get into his hands any butter or cheese, to sell the same again, shall be deemed an ingrosser. f. 3. Ingrossing.

Regrating.

3. But the buying and selling again of any butter or cheese, by any licensed badger, lader, kiddier, or carrier, shall not be deemed regrating. 5 & 6 Ed. 6. c. 14. s. 7.

Cheesemongers
in London.

4. And nothing in these two acts shall extend to cheesemongers and tallowchandlers in *London* and *Westminster*, for what they shall sell for victualling of ships, or for what they shall sell in their shops or market, not exceeding four weights of cheese, and four barrels of butter. 21 J. c. 22.

Provided, that if the justices of the peace in any county, in their quarter sessions, shall declare that the said traders in butter and cheese shall forbear to buy any in such county for any time, and they do buy within that time, and sell the same by retail, they shall not have the benefit of this act. *id.*

III. Concerning the shipping of butter and cheese for London.

No undue preference.

1. Every warehousekeeper, weigher, searcher, or shipper of butter and cheese, shall receive all butter and cheese that shall be brought to him, for the *London* cheesemongers, and ship the same without undue preference; and shall have for his pains 2s. 6d. for every load: and if he shall make default, he shall, on conviction before one justice, on oath of one witness, or confession, forfeit for every firkin of butter 10s. and for every weigh of cheese 5s. half to the churchwardens and overseers for the use of the poor, and half to the informer, to be levied by the constable by distress and sale. 4 W. c. 7. s. 4.

Book of entry.

2. And he shall keep a book of entry of receiving and shipping the goods; on pain of 2s. 6d. for every firkin of butter, and weigh of cheese, to be levied and applied in like manner; and for want of distress, to be committed till paid. 4 W. c. 7. s. 5.

Master of a ship
refusing to take
in.

3. A master of a ship refusing to take in butter or cheese, before he is full laden (except it be a cheesemonger's own ship sent for his own goods), shall forfeit for every firkin of butter refused 5s. and for every weigh of cheese 2s. 6d. to be levied and applied in like manner. 4 W. c. 7. s. 6.

Appeal.

4. Person aggrieved by the determination of the justice, may appeal to the next sessions, giving 20l. bond, with one or more sureties, to the party, to pay costs (within a month after) if he is not relieved on his appeal. 4 W. c. 7. s. 10.

5. But

5. But this act shall not extend to any warehouse in *Exception,*
Cheshire or Lancashire. 4 W. c. 7. f. 9.

IV. Exporting of butter and cheese.

Butter and cheese may be exported custom free. 3 *IV. Exportation,*
c. 8.

V. Importing of butter and cheese.

By the 32 C. 2. c. 2. No butter or cheese shall be *Importation,*
imported from *Ireland.*

But by the 3 G. 3. c. 20. The importation of stale
and dirty butter, not fit to eat, called grease butter from
Ireland, shall be permitted for five years, duty free; pro-
vided it be duly entered at the custom house.

And if any such grease butter shall be stopped or seized
by any officer of the customs, under pretence of its being
fit to eat, or otherwise as not coming within the meaning
of this act; two justices, within 14 days after application
to them made, may hear and determine the same; and
for that purpose, if they think fit, may inspect the butter
in question; and also may call before them, and examine
on oath, any two reputable persons, dealers in butter, one
whereof to be chosen by the importer or proprietor, and
the other by the officer; and also such other witnesses as
shall be desired by either party. And their determination
shall be final; without any certiorari to be allowed.

And by the 5 G. 3. c. 1. Butter (not being grease but-
ter) may be imported from *Ireland* for 12 months from the
commencement of the said act; on paying at the port of
importation 4 d. salt duty for every hundred weight.

Note; There are special directions in the act of 8 G.
c. 27. concerning the selling of butter in the city of *York,*
and in the act of the 17 G. 2. c. 8. concerning the same
in *New Malton*; which are not general enough to be here
inserted.

Buttons.

1. **N**O person shall sell or offer to sale, or import, any *Foreign buttons,*
foreign bone-lace, cut-work, imbroidery, fringe,
band strings, buttons, or needle-work, made of thread
and

and silk, or either of them, or any foreign buttons whatsoever; on pain that he who shall offer them to sale shall forfeit the same and 50 l. and the importer shall forfeit the same and 100 l. half to the king, and half to him that shall sue. 13 & 14 G. 2. c. 13. s. 2. 4 W. c. 10. s. 2.

And on complaint and information given to a justice of the peace, at times reasonable, he shall issue his warrant to the constable, to enter and search for such manufactures in the shops being open, or warehouses, and dwelling houses of such persons as shall be suspected, and to seize the same. 13 & 14 G. 2. c. 13. s. 3. 4 W. c. 10. s. 2.

And *English* bone-lace, needlework, point, or cut-work, may be exported custom-free. 11 & 12 W. c. 3. s. 15.

Wood buttons.

2. No person shall make, sell, or set on any buttons made of wood only, and turned in imitation of other buttons; on pain of 40 s. a dozen, half to the king, and half to him that shall sue in any court of record. 10 W. c. 2.

Made of wood only] H. 13 W. King and Roberts. An information was exhibited against the defendant, for having made wooden buttons, contrary to the statute. Upon trial, the jury found a special verdict, that all the button was of wood, but there was in it a shank of wire. And after argument, judgment was given for the king, namely, that this was a button of wood, notwithstanding the shank, which is no essential part of buttons; for buttons of silk and hair have no shanks. Lord Raym. 712.

Cloth buttons.

3. By the said act of the 10 W. c. 2. No person shall make, sell, or set on, any buttons made of cloth, serge, drugget, frize, camlet, or other stuffs of which cloaths are usually made; on pain of 40 s. a dozen, half to the king, and half to him that shall sue in any court of record.

And by the 8 An. c. 6. No taylor or other person shall make, sell, set on, use, or bind on any cloaths, any buttons or button holes, made of or used, or bound with serge, drugget, frize, camlet, or other stuffs of which cloaths are usually made; on pain of 5 l. a dozen, half to the king, and half to him that shall sue in any court of record; or on complaint to two justices, they may summon witnesses, and levy the penalty, and return the overplus if any be; and if any person is aggrieved, he may appeal to the next sessions.

But by this act no power is given to make distress. The next that occurs, is the statute of 4 G. c. 7. which in the statutes at large is a loose, injudicious, and ungrammatical

cal act, and by its garb may well enough seem to have been drawn up by the taylor or button makers; whereby it is enacted as follows:

No taylor or other person shall make, sell, set on, or bind on any cloaths, any buttons, or button holes made of, or used, or bound with cloth, serge, drugget, frize, camlet, or any stuffs that cloaths are usually made of (velvet excepted); on pain of 40 s. a dozen: To be determined by one justice where the offence shall be discovered, or the offender shall inhabit, on oath of one witness, in three months after the offence committed; and to be distributed (charges of conviction first deducted) half to the informer, and half to the poor of the parish or place where the offence shall be discovered: if not paid (being lawfully demanded) in 14 days after conviction, the justice shall issue his warrant to the constable where the offender dwells, or can be found, to levy it by distress and sale; and where no sufficient distress can be found, he shall be committed to the common gaol of the county or place where he shall be found, to be kept to hard labour for three calendar months. Persons aggrieved may appeal to the sessions, giving sufficient notice; and the sessions may allow costs to the party aggrieved.

And taylor's causing their apprentices or servants to make such cloaths, shall themselves be subject to the penalties.

And all such cloaths, made with such buttons and button holes, *exposed to sale*, shall be forfeited and seized, and recovered and disposed of as the other penalties.

And by the statute of the 7 G. 1. c. 12. No person shall *use or wear* on any cloaths (velvet excepted) any such buttons or button holes; on pain of 40 s. a dozen, on conviction by confession, or oath of one witness; and any justice of the peace, where the offence shall be committed, or the offender shall inhabit, shall on complaint or information on oath, of any credible person, in one month after the offence, summon the party, and on his appearance or contempt, examine the matter, and on due proof by confession, or oath of one witness, convict the offender, and cause the forfeiture by his warrant to be levied by distress and sale; the said penalties to be half to him on whose oath the party shall be convicted, and half to the poor of the parish where the offence shall be committed. And persons aggrieved may appeal to the next quarter sessions, giving 8 days notice.

To him on whose oath the party shall be convicted] This is almost the only instance where a share of the penalty is given in express words, in a popular action, to the party on whose oath any person is convicted; and the contrary doctrine seems generally to prevail, that the defendant shall not be condemned upon the sole testimony of the plaintiff swearing for his own interest: And it is certainly against the common law, that such a person should be a witness at all; and therefore his right to give evidence in his own cause, and the power to convict the defendant upon that sole evidence, must depend on the express words of some statute.

Buying of titles.

I. By the common law.

II. By statute.

I. By the common law.

IT seemeth to be an high offence at common law, to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate; and it seemeth not to be material, whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary. *1 Haw. 261.*

II. By statute.

1. By the statute of 13 Ed. 1. c. 49. *No person of the king's house shall buy any title whilst the thing is in dispute; on pain of both the buyer and seller being punished at the king's pleasure.*

2. And

2. And by 32 H. 8. c. 9. *None shall buy any pretended right in any land, unless the seller hath taken the profit thereof one year before; on pain that the seller shall forfeit the land, and the buyer the value, half to the king, and half to him that shall sue within one year.* f. 2, 6.

Pretenced title] But he who is in lawful possession may purchase the pretended title of any others. 32 H. 8. c. 9. f. 4.

One year before] But no conveyance made by one who hath the uncontested possession, and undisputed absolute propriety of lands, is any way within the meaning of this statute. 1 Haw. 265.

3. *And the offence of buying of titles may be laid in any county, at the pleasure of the informer.* 31 El. c. 5. f. 4.

Callico. See **Excise**.
 Cambrick. See **Linen**.
 Candles. See **Excise**.
 Capias. See **Process**.
 Cards. See **Stamps**.

Carriers.

1. **A**LL persons carrying goods for hire, as masters Carrier, who; and owners of ships, lightermen, stage coachmen, and the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm, for their faults or miscarriages. 1 Bac. Abr. 343.

2. By the 3 W. c. 12. The justices in Easter sessions Rates for car-
 yearly, shall rate the prices of all land carriage of goods riage.
 to be brought into any place within their jurisdiction, by
 any common waggoner or carrier; and shall certify the
 rates so made to the mayors and other chief officers of
 the several market towns within their jurisdiction, to be
 hung up in some publick place to which all persons may
 resort: And no such common waggoner or carrier shall
 take for carriage above the rates so set, on pain of 5 l.

by distress, by warrant of two justices where such waggoner or carrier shall reside, to the use of the party grieved. *f.* 24.

And by 21 G. 2. c. 28. If any common waggoner or carrier shall demand and take any greater price for bringing goods to London, or to any place within the bills of mortality, than is allowed and settled by the justices for the place from whence the same are brought for the carrying of goods from London to the said place; he shall forfeit 5 l. to the party grieved, to be recovered as by the said act of the 3 W. or by distress and sale of his goods, by warrant from two justices of Middlesex, Surrey, London, or Westminster. *f.* 3.

And the clerk of the peace in the country shall, immediately after Easter sessions yearly, certify to the lord mayor of London, and to the respective clerks of the peace for Middlesex, Surrey, and Westminster, the rates made for the carriage of goods in their respective counties and places; which certificate, or an attested copy thereof, signed by the officer to whom the same shall be transmitted, shall be sufficient evidence of the prices so set. *f.* 3.

And every common waggoner or carrier shall have his christian and surname and place of abode, in large or capital letters, placed upon some conspicuous part of his carriage, before he shall drive the same; on pain of 20 s. to be levied and recovered as aforesaid. *f.* 4.

And he shall not evade the law, by refusing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 1 Bac. Abr. 344.

So an action will lie against a common ferryman, who refuseth to carry passengers. *id.*

But if the porter puts up the box of a passenger behind a stage coach, and the master as soon as he knows of it says, that he is already full, and refuses to take the charge of it, the master shall not be liable. For this is the same with an host who refuseth his guest, his house being full, and yet the party says he will shift, or the like, if he be robbed, the host is discharged. *id.*

So a carrier may refuse to admit goods into his warehouse at an unreasonable time, or before he is ready to take his journey; but he cannot refuse to do the duty incumbent upon him by virtue of his publick employment. L. Raym. 652.

3. No carrier with any horse or horses, nor waggon-man, carman, or wain-man, with their respective carriages, shall by themselves, or any other, travel on the lord's day, on pain of 20 s. on conviction in six months, before one justice (or mayor), on view, or confession, or oath of two witnesses, to be levied by the constable or churchwardens by distress; to the use of the poor, except that the justice may reward the informer with any sum not exceeding a third part. 3 C. c. 1.

4. It hath been holden, that a carrier imbezilling goods which he has received to carry to a certain place, is not guilty of felony, because there was not a felonious taking; but is liable only to a civil action. 1 Haw. 89, 90.

5. But it hath been resolved, that if a carrier open a pack, and take out part of the goods, with intent to steal it, he may be guilty of felony; in which case it may be said, not only that such possession of a part distinct from the whole, was gained by wrong, and not delivered by the owner; but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered.

1 Haw. 90.

6. Also it seems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again secretly, with intent to steal them, he is guilty of felony; because the possession, which he received from the owner, being determined, his second taking is in all respects the same, as if he were a mere stranger. 1 Haw. 90.

7. Also it hath been resolved, if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and disposeth of them to his own use, that this is felony; because this declareth that his intention originally was not to take the goods, upon the agreement and contract of the party, but only with a design of stealing them. Kelynge 82.

8. Where goods are delivered to a carrier, and he is robbed of them, he shall be charged, and answer for them, by reason of the hire: And this was at the common law, before the hundred was answerable over to him; because such robbery might be, by consent and combination, carried on in such a manner, that no proof could be had of it. 1 Salk. 143.

And altho' it may be thought a hard case, that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconvenience would be far more intolerable, if he were not so: for it would be in his power

Otherwise losing
or damaging
goods.

to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. 12 *Mod.* 482.

9. And generally, if a man delivers goods to a common carrier, to carry to a certain place; if he loses or damages them, an action upon the case lies against him: for by the custom of the realm, he ought to carry them safely. 1 *Bac. Abr.* 343.

And if he be a common carrier, tho' there be no agreement, or rate settled, or promise of payment; yet he shall recover his hire on a *quantum meruit*, and therefore shall be liable for loss and damages. *id.*

Also if a person, who is no common carrier, takes upon himself to carry my goods, tho' I promise him no reward, yet if my goods are lost or damaged by his default, I shall have an action against him. *id.*

For the very taking of the goods is a general consideration, tho' he be not a common carrier: and the acceptance of the goods makes him liable. *Show.* 104.

Goods delivered
to the carrier's
servant.

10. A delivery to the carrier's servant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and lost, an action will lie against the carrier. *Read. Car.*

At Bury assizes, 1732, in the case of *Harvey* against *Syliard* and his wife, the plaintiff brought his action against *Syliard* and his wife, for a box with 80 l. in it, which was delivered to her as book-keeper to her brother, who was a carrier, in order to be sent by the waggon to London; which 80 l. was afterwards lost: It was adjudged, that the action would not lie against her, but it ought to have been brought against the brother himself. And the plaintiff was nonsuited. 2 *Barnard.* 234.

How far it is ne-
cessary that the
carrier should
know what the
goods are.

11. If a box is delivered generally to a carrier, and he accepts it; he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases the carrier is not liable. *Str.* 145.

If a man delivers a box to a carrier to carry, and he asks what is in it, and the man tells him, a book and tobacco (as the case was) and in truth there is 100 l. besides; yet if the carrier is robbed, he shall answer for the money: for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance. 1 *Bac. Abr.* 345.

But if a person, being a common carrier, receives by his book-keeper from another man's servant, two bags of money

money sealed up, containing as was told him 200 l. and the book-keeper gives a receipt for his master to this effect, Received of such a one two bags of money sealed up, said to contain 200 l. which I promise to deliver on such a day at such a place unto such a person, he to pay 10s. *per cent.* for carriage and risque; tho' the bags contain 400 l. and the carrier is robbed, he shall be answerable only for 200 l. for this is a particular undertaking; and as it is by reason of the reward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reasonable he should be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

A man took a place in a stage coach, and in the journey the defendant by negligence lost the plaintiff's trunk: upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that drove the coach, who promised to take care of it, but lost it: *Holt* chief justice held, that the master was not chargeable, and that a stage coachman is not within the custom as a carrier is, unless the master takes a distinct price for the carriage of the goods as well as of the persons. 1 *Salk.* 282.

But by the custom and usage of stage coaches, every passenger uses to pay for the carriage of goods above such a weight; and in such case the coachman shall be charged for the loss of goods beyond such weight. *Comyn* 25.

12. Where goods are stolen from a carrier, he may prefer an indictment against the felon, as for his own goods; for tho' he has not the absolute property, yet he has such a possessory property, that he may maintain an action of trespass against any one who takes them from him, and so may indict a thief for taking them; and the indictment were good also, if it had been brought by the real owner. *Kelynge* 39.

13. And there is a special case, wherein it is said, that a man may commit larceny by stealing his own goods delivered to the carrier, with intent to make him answer for them; for the carrier had a special kind of property in the goods, in respect whereof, if a stranger had stolen them, he might have been indicted generally as having stolen the said carrier's goods, and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner. 1 *Haw.* 94.

Carrier may indict for goods stolen, as his own property.

Person stealing his own goods from the carrier.

Casual death. See **Deodand.**

Cattle.

So much of this title as concerns butchers in particular, may be seen under title **Butchers**. The form and manner of licensing *Drovers* of cattle is inserted under the title **Badgers**, as being connected with the licensing of badgers, laders, kidders, carriers, buyers, and transporters coastwise, of corn or grain, butter and cheese.

- I. What number of cattle a man shall keep.*
- II. Concerning the bringing of cattle into England.*
- III. Buying and selling of cattle.*
- IV. Stealing, killing, or maiming of cattle.*

I. What number of cattle a man shall keep.

What proportion
shall be observed.

I. **F**OR the encouragement of the breeding of cattle, every person who shall keep above sixscore sheep, above what is for his household, shall for every threescore sheep keep one milch cow, and bring up yearly for every sixscore sheep one calf; on pain of forfeiting 20 s. a month.

And every person who shall keep above 20 oxen, runts, shrubs, steers, heifers, or kine, shall for every ten of them keep one milch cow yearly, and rear one calf for the space of one year, (unless it die in the mean time), for every such two milch cows; on pain of forfeiting 20 s. a month:

These penalties to go, half to the king, and half to him who shall sue in the sessions or other court of record.
2 & 3 P. & M. c. 3. 7 J. c. 8.

None to have
above 2000
sheep.

2. And for the encouragement of tillage, and to prevent the ingrossing of farms into a few hands, no man shall keep above 2000 sheep, at sixscore to the hundred, over and above what is necessary for his household; except it be upon his own proper estate; on pain of 3 s. 4 d. for every sheep above that number, half to the king, and half to him that shall sue for the same in sessions:—lambes not to be accounted sheep, till the second midsummer after they are lambed. 25 H. 8. c. 13.

II. Concerning the bringing of cattle into England.

Cattle of the isle
of Man.

1. By the 5 G. 3. c. 43. Bestials may be freely imported from the isle of *Man*.

2. By

2. By the sixth article of the union, no *Scotch* cattle, Scotch cattle, carried in *England*, shall be liable to any other duties, than those to which the cattle of *England* are liable. 5 *An. c. 8.*

3. By the 18 *C. 2. c. 2.* the importation of cattle from *Ireland*, and other places beyond sea, is declared to be a common nuisance. Irish cattle.

And if any shall be imported, any person may seize them, and keep them 48 hours; and if in that time, it be made appear to a justice, on the oath of two witnesses, that they were not imported from *Ireland*, nor from any other place beyond sea, then they shall be delivered on warrant of such justice; but in default of such proof and warrant, then to be forfeited. 18 *C. 2. c. 2.* 32 *C. 2. c. 2.*

And the seizer, within six days after the conviction and forfeiture, shall cause them to be killed; the hides and tallow he shall have himself, the rest shall go to the poor, to be distributed by the churchwardens and overseers. 32 *C. 2. c. 2.*

And the seizers, churchwardens, or overseers neglecting their duty herein, shall forfeit 40 s. for every one of the great cattle, and 10 s. for sheep and swine; half to the poor, and half to the informer, by warrant of one justice, by distress; for want of distress, commitment for three months. 32 *C. 2. c. 2. f. 6.*

And the ships bringing the same shall be forfeited, and any person may seize and sell them, half to the poor, and half for himself. 20 *C. 2. c. 7.*

And a justice of the peace may by warrant apprehend the seamen, and all others concerned, and commit them to gaol for three months. 20 *C. 2. c. 7.*

And if no seizure is made in the district where they are first imported, such place shall forfeit 100 l. to the use of the house of correction. 20 *C. 2. c. 7.*

And if the cattle come by collusion of officers, or otherwise, into any other than the first district, they may be seized there in like manner. 20 *C. 2. c. 7.*

And persons confederating to elude this act, shall incur a præmunire, 20 *C. 2. c. 7.*

And also, cattle once seized, and afterwards found in another district may be resealed there. 32 *C. 2. c. 2. f. 10.*

And *English* cattle intermixed in a drove with *Irish* cattle, may be seized as *Irish* cattle. 32 *C. 2. c. 2. f. 11.*

But, finally, by the 5 *G. 3. c. 10.* these restrictions are taken off for a time; and thereby it is enacted, that all sorts of cattle may be imported from *Ireland*, duty free, for five years.

III. *Buying and selling of cattle.*

None shall buy
and sell in the
same market.

1. No person shall buy any ox, steer, ront, cow, heifer, or calf, and sell the same again alive, in the same market or fair; on pain of forfeiting double value, half to the king, and half to him who shall sue. 3 & 4 Ed. 6. c. 19. 3 C. c. 4. f. 7, 8.

Not to sell again
in less than five
weeks.

2. And if any person (except drovers licensed) shall buy any ox, ront, steer, cow, heifer, calf, sheep, lamb, goat, or kid living, and sell the same again alive, unless he keep and feed the same for five weeks; he shall forfeit double value, half to the king, and half to him that shall sue in any court of record: And also the justices in sessions may determine the same, by inquisition, presentment, bill, or information, and by examination of two witnesses, and make process thereupon as upon indictment; and make estreats for the king's moiety, and award execution of the other moiety for the complainant, by *fieri facias*, or *capias*, as the courts at *Westminster* may do. 5 & 6 Ed. 6. c. 14. f. 9, 10.

Note, in the statute of 31 G. 2. c. 40. there are regulations concerning the buying and selling of cattle within the bills of mortality: and the offences concerning the same are to be heard and determined, and the penalties levied, by the justices. Which regulations, not being general, are not here inserted.

Driving on sun-
days.

3. By the 3 C. c. 1. No drover, with any cattle, shall travel on the lord's day; on pain of 20 s. which may be levied by the constable or churchwarden, by warrant of one justice, on conviction on his view, or by confession, or the oath of two witnesses; one third to the informer, and two thirds to the poor.

IV. *Stealing, killing, or maiming of cattle.*

Killing or
wounding in
the night.

1. By the 22 & 23 C. 2. c. 7. If any person shall in the night time maliciously, unlawfully, and willingly *kill or destroy* any horses, sheep, or other cattle, he shall be guilty of felony; but without corruption of blood, or loss of dower: But to avoid judgment of death, or execution thereupon, he may chuse to be transported to some of the plantations, to be mentioned in the judgment, for 7 years.

And if any person shall in the night time maliciously, unlawfully, and willingly *maim, wound, or otherwise hurt* any horses, sheep, or other cattle, whereby the same shall
not

not be killed or utterly destroyed; he shall forfeit treble damages, by action of trespass, or upon the case:

And three justices (1 Q.) may inquire by a jury and witnesses; and may issue warrants for summoning jurors, and for apprehending persons suspected, and take their examinations; and cause witnesses to come before them to give information on oath, so as no person to be examined shall be proceeded against, for any offence concerning which he is examined as a witness, and shall make a true discovery: and if such witness, being summoned, refuse to appear, they may commit him till he submit to be examined on oath.

2. And by the 14 G. 2. c. 6. and 15 G. 2. c. 34. If any person shall feloniously drive away, or in any other manner feloniously steal any ox, bull, cow, calf, steer, bullock, heifer, sheep, or lamb; or shall wilfully kill any ox, bull, cow, calf, steer, bullock, heifer, sheep, or lamb, with a felonious intent to steal the whole carcass, or any part thereof; or shall assist or aid in committing any such offence, he shall be guilty of felony without benefit of clergy.

Stealing or killing with intent to steal; 10l. reward.

And every person, who shall apprehend and prosecute to conviction any offender, shall have 10l. reward. In order to which, he shall have a certificate signed by the judge, before the end of the assizes, certifying the conviction, and where the offence was committed, and that such offender was apprehended and prosecuted by the person claiming the reward; and if there are several claimants, the judge shall in the said certificate direct what share shall be paid to each claimant. Which certificate being tendred to the sheriff, he shall within a month pay the same without deduction; on pain of forfeiting double, with treble costs. The same to be allowed in his accounts, or to be repaid to him out of the treasury.

3. And by the 9 G. c. 22. commonly called the Black act, which is inserted at large under the title of that name, If any person shall unlawfully and maliciously kill, maim, or wound any cattle, he shall be guilty of felony without benefit of clergy; but without corruption of blood.

Killing or wounding by the Black act.

And the hundred shall be answerable for the damages, not exceeding 200l.

And if any person shall apprehend, or cause to be convicted, any offender, and shall be killed, or wounded, so as to lose an eye or the use of any limb, in endeavouring to apprehend or secure him; on proof thereof at the sessions, and on certificate thereof from thence, the sheriff shall within 30 days pay to the person intitled the sum of 50l. to be repaid to him out of the treasury.

Certiorari.

Certiorari, what.

A Certiorari is an original writ, issuing out of the court of chancery or the king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to *artify* or to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice, before the king or such justices as he shall assign to determine the cause. 1 *Bac. Abr.* Certior. A.

What things may be certified without a writ of certiorari.

Also, the justices of the peace may deliver or send into the king's bench, indictments found before them, or recognizances of the peace taken before them, or force recorded by them, without any certiorari. *Dalt. c.* 195.

Concerning which writ of certiorari, it is here shewn,

I. in what cases it is grantable.

II. How to be granted and allowed.

III. The effect of it.

IV. The return of it.

I. In what cases it is grantable.

In cases where a writ of error lies not.

1. A certiorari lies in all judicial proceedings, in which a writ of error does not lie; and it is a consequence of all inferior jurisdictions erected by act of parliament to have their proceedings returnable in the king's bench. *L. Raym.* 469, 580.

Where not specially prohibited by statute.

2. And therefore a certiorari lies to justices of the peace, even in such cases which they are impowered by statute finally to hear and determine; and the superintendency of the court of king's bench is not taken away without express words. 2 *Haw.* 286.

After conviction.

3. But it seems agreed, that a certiorari shall never be granted to remove an indictment after a conviction, unless for some special cause; as where the judge below is doubtful what judgment to give. 2 *Haw.* 288.

And, *E.* 18 *G.* 2. *K.* and *Nicolls.* An indictment was removed into the court of king's bench by certiorari, after conviction, and before judgment. Upon which a doubt arose, what the court could do, the certiorari being brought before judgment; and this court not being apprized of the circumstances of the offence, could not tell what judgment

judgment to give: and in *Carth.* 6. it is said, they cannot give judgment. A rule therefore was made, to shew cause why the certiorari should not be quashed, so as to remit it back to the sessions; which was afterwards made absolute. *Str.* 1227.

4. Also, it seems a good objection against the granting a certiorari, that issue is joined in the court below, and a venire awarded for the trial of it. *2 Haw.* 288. After issue joined.

5. It hath been adjudged, that wherever a certiorari is by law grantable for an indictment, the court is bound of right to award it at the instance of the king, because every indictment is the suit of the king, and he has a prerogative of suing in what court he pleases. But it seems to be agreed, that it is left to the discretion of the court, either to grant or deny it at prayer of the defendant. *2 Haw.* 287. Where the court is bound of right to grant it.

6. And it seems that the court will not ordinarily, at the prayer of the defendant grant a certiorari for the removal of an indictment of perjury, or forgery, or other heinous misdemeanor; for such crimes deserve all possible discountenance, and the certiorari might delay, if not wholly discourage the prosecution. *2 Haw.* 287. Not for heinous crimes.

II. How to be granted and allowed.

1. On indictment or presentment: By the 5 *H. c.* 11. and 8 & 9 *W. c.* 33. it is enacted, that in term time, no writ of certiorari, at the prosecution of any party indicted, shall be granted out of the king's bench, to remove any indictment or presentment of trespass or misdemeanor, before trial had, from before the justices, in sessions; unless such certiorari shall be awarded upon motion of counsel, and by rule of court made for the granting thereof. How to be granted on indictment or presentment.

But in the vacation, writs of certiorari may be granted by any justice of the king's bench; whose name shall be indorsed on the writ, and also the name of the person at whose instance it is granted.

And all the parties indicted, prosecuting such certiorari shall before the allowance thereof, find two sufficient manucaptors who shall enter into a recognizance before a justice of the king's bench (who shall indorse the same on the writ), or before a justice of the peace of the county or place, in the sum of 20*l.* with condition, at the return of the writ, to appear and plead to the said indictment or presentment, in the said court of king's bench, and at his own costs and charges to cause and procure the issue that shall be joined thereupon, or any plea relating thereunto, to be tried at the next assizes for the county wherein the indictment

indictment or presentment was found, after such certiorari shall be returned, or the next term if in London, Westminster, or Middlesex, unless the court shall appoint another time, and if so, then at such other time; and to give due notice of such trial, to the prosecutor or his clerk in court; and also that the party prosecuting the writ of certiorari, shall appear from day to day, in the said court of king's bench, and not depart until he shall be discharged by the court.

And the said recognizance shall be certified into the king's bench, with a certiorari and indictment, to be there filed, and the name of the prosecutor (if he shall be the party grieved), or some publick officer, shall be indorsed on the indictment.

And if the defendant prosecuting the writ of certiorari, be convicted of the offence for which he was indicted, then the court of king's bench shall give reasonable costs to the prosecutor, to be taxed according to the course of the said court, who shall for the recovery thereof, within ten days after demand and refusal of payment, on oath, have an attachment awarded; and the recognizance not to be discharged till the costs are paid.

But if the person procuring the certiorari, being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound as aforesaid, the justices may proceed to the trial of the indictment in sessions, notwithstanding the writ of certiorari delivered.

At the prosecution of any party indicted] This extends only to certiorari's procured by persons indicted; from whence it follows, that those which are procured by the prosecutor of an indictment, remain as they were at common law. 2 Haw. 292.

To be tried at the next assizes] But the recognizance shall not be forfeited, unless the prosecutor give rules according to the course of the court. 2 Haw. 293.

Reasonable costs] The master of the crown office, in taxing the costs, ought only to consider those which are subsequent to the certiorari. 2 Haw. 292.

May proceed to the trial] Nevertheless they must make a return to the certiorari, otherwise they will be in contempt to the court; for all writs must be obeyed, unless good cause be shewn to the contrary; and the proper way of shewing it, is to return it. 2 Haw. 292.

How to be granted on an order or conviction.

2. On a conviction or order: By the 13 G. 2. c. 18. it is enacted, that no certiorari shall be granted, to remove any conviction, judgment, order, or other proceedings, before any justice of the peace, or quarter sessions, unless it be applied for in six calendar months after such proceedings had or made, and unless

unless it be duly proved upon oath, that the party suing forth the same, hath given six days notice thereof in writing, to the justice or justices, or two of them (if so many there be), before whom such proceedings have been, to the end that such justices, or the parties therein concerned, may shew cause if they so think fit, against the issuing the certiorari.

And by 5 G. 2. c. 19. No such certiorari shall be allowed, to remove any such judgment or order, unless the party prosecuting the certiorari, before the allowance thereof, enter into a recognizance with sufficient sureties, before a justice of the county or place, or before the justices at sessions where such judgment or order shall have been given or made, or before a justice of the king's bench, in 50 l. with condition to prosecute the same, at his own costs and charges with effect, without wilful delay, and to pay the party in whose favour the judgment or order was made, within a month after the same shall be confirmed, his full costs to be taxed according to the course of the court where such confirmation shall be. And if he shall not enter into such recognizance, or shall not perform the conditions, the justices may proceed and make such further order for the benefit of the party for whom the judgment shall be given, in such manner as if no certiorari had been granted.

The said recognizance to be certified into the king's bench, and there filed, with the certiorari and order or judgment removed thereby.

And if the order or judgment shall be confirmed by the court, the person intitled to the costs, for the recovery thereof, within ten days after demand made, upon oath of such demand and refusal of payment, shall have an attachment granted for the contempt; and the recognizance not to be discharged till the costs are paid and the order complied with.

E. 1 An. A rule was made in the court of king's bench, that no certiorari should be granted to remove orders of justices, from which the law has given an appeal to the sessions, before the matter be determined on the appeal, because it hinders the privilege of appealing; and that if any order be removed before appeal, it should be sent down again: But if the time of appeal be expired, that case is not within the rule: By *Holt Ch. J.*—But afterwards, *M. 4 An.* in the case of *Shellington*, it was held, that advantage must be taken of this rule upon the motion to file the order; for that after it is filed it is too late. *1 Salk. 147.*

But in the case of the borough of *Warwick*, *M. 8 G. 2.* There was an appeal from a poor rate; and the sessions made an order that the churchwardens should produce the books at an adjourned day; before which, a certiorari

was brought to remove that order: And it was held to lie, though the appeal was depending; else the order must be obeyed before the validity of it can be determined. It was also held, that an appointment of overseers may be removed before an appeal to the sessions; for the rule laid down in 1 *Salk.* 147. extends only to the case where there is a limited time for appealing, as to the *next* quarter sessions; but the statute of the 43 *El. c. 2.* is not so restrained: and consequently it can never be said, that the time for appealing is out. And if the appeal from an appointment is lodged, there can be no certiorari, till the sessions hath made a determination; and a certiorari brought, pending such appeal, shall be superseded. *Str.* 991.

III. The effect of it.

Subsequent proceedings void.

1. After a certiorari is allowed by the inferior court, it makes all the subsequent proceedings on the record that is removed by it erroneous. 2 *Haw.* 293.

Except where the jury is sworn.

2. But it hath been adjudged, that if a certiorari for the removal of an indictment before justices of the peace be not delivered, before the jury be sworn for the trial of it, the justices may proceed. 2 *Haw.* 294.

And after judgment.

3. And the justices may set a fine to compleat their judgment, after a certiorari delivered. *L. Raym.* 1515.

Removes all after the teste of it.

4. A certiorari removes all things done between the teste and return. *L. Raym.* 835, 1305.

Removes the record itself.

5. A certiorari removes the record it self out of the inferior court; and therefore if it remove the record against a principal, the accessory cannot there be tried. 2 *Haw.* 325.

How far it supercedes the obligation of a recognizance.

6. It hath been holden, that a certiorari for the removal of a recognizance for the good behaviour, or an appearance at sessions, will supersede the obligation of it: but this would be highly inconvenient, and the contrary seems to be supported by the better authority. 2 *Haw.* 292.

Case where it is awarded against law.

7. If a *superfedeas* come out of a superior court, to the justices, they ought to surcease, altho' the *superfedeas* be awarded against law; for they are not to dispute the command of a superior court, which is a warrant to them. *Crom.* 129.

IV. The return of it.

Return of the certiorari.

1. Every return of a certiorari ought to be under seal. 2 *Haw.* 294.

2. And altho' the *custes rotulorum* keep the records, yet must the justices, to whom it is directed, return the certiorari; and therefore if it is directed to the justices of the peace, and the clerk of the peace only return it, nothing is thereby removed. 2 *Haw.* 294.

3. The certiorari may be sometimes to remove and send up the record itself, and sometimes but only the tenor of the record (as the words therein be), and it must be obeyed accordingly. *Dalt. c.* 195. 2 *Haw.* 295.

4. A return was in paper, (and not upon parchment); and for that reason was held by the court not good. *Barnardist.* 113. H. 2 G. 2. K. and the inhabitants of Darlington.

5. Upon a certiorari to remove an indictment of a riot, or forcible entry, or the like, the return must have these words, *as also to hear and determine divers felonies, &c.* according to the commission; for if the return mentions only that they are justices of the peace, without such words, the return is insufficient. *Dalt. c.* 195.

6. If the person to whom a certiorari is directed, do make a false return, yet the court will not stay filing it on affidavit of its being false, except in publick cases, as in cases of commissioners of sewers, or for not repairing highways, or for some such special causes; because the remedy for a false return is either an action on the case at the suit of the party grieved, or an information at the suit of the king. *Dalt. c.* 195.

7. If the person to whom the certiorari is directed, do not make a return, then an *alias*, that is, a second writ; then a *pluries*, that is, a third writ, or *causam nobis significes*, shall be awarded, and then an attachment. *Crom.* 116.

Besides these general rules, in common to all certioraries, there are many times special directions about granting, and allowing or not allowing them, in particular cases, which are treated of under their respective titles; such as highways, game, tithes, swearing, and many others.

The return of a certiorari may be thus :

First, On the backside of the writ indorse these or the like words :

The execution of this writ appears in a schedule to the same writ annexed.

Certiorari.

And that schedule may be thus, on a piece of parchment by it self, and filed to the writ :

Westmorland. **I** Sir Philip Musgrave, baronet, one of the keepers of the peace and justices of our lord the king assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, by virtue of this writ to me delivered, do under my seal certify unto his majesty in his court of king's bench, the indictment of which mention is made in the same writ, together with all matters touching the same indictment. In witness whereof I the said Sir P. M. have to these presents set my seal. Given at——in the said county, the——day of——in the——year of the reign of——.

Then take the record of the indictment, and close it within the schedule, and seal and send them up both together with the certiorari.

Challenge. See **Jurors**.

Champerty. See **Maintenance**.

Chance medley. See **Homicide**.

Cheat.

Of cheats punishable by publick prosecution, there are two kinds,

I. *By the common law.*

II. *By statute.*

I. *By the common law.*

I. **CHEATS** which are punishable by the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty ; as by playing with false dice ; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written ;

ten ;

ten; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Haw.* 188.

2. It seemeth to be the better opinion, that the deceitful receiving of money from one man, to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which, common prudence and caution may be a sufficient security. 1 *Haw.* 188.

3. A person for a counterfeit pass, was adjudged to the pillory, and fined. *Dalt. c.* 32.

4. On an indictment against the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn instead of it, it was moved to quash the same, because it is only a private cheat, and not of a publick nature. It was answered, that being a cheat in the way of trade, it concerned the publick, and therefore was indictable. And the court unanimously agreed not to quash it. *T.* 16 *G.* 2. *K.* and *Wood.* Sess. C. V. 1. 217.

5. A person falsely pretending that he had power to discharge soldiers, took money of a soldier to discharge him; and being indicted for the same, the court held the indictment to be good. *T.* 3 *C.* *Serlestead's* case. 1 *Latch* 202.

6. As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound); so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally: Thus if a minor goes about the town, and pretending to be of age, defrauds many persons by taking credit for considerable quantities of goods, and then insists on his non-age; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100.

II. By statute.

1. By the 33 *H.* 8. c. 1. *If any person shall falsely and deceitfully obtain, or get into his hands or possession, any money, goods, chattels, jewels, or other things, of any person, by colour*

lour and means of any false privy token, or counterfeit letter made in another man's name; and shall be convicted thereof, by examination of witnesses, or confession, at the assizes or sessions, or by action in any court of record; he shall have such punishment by imprisonment, pillory, or other corporal pain (except death) as the court shall appoint. Saving to the party grieved such remedy by action or otherwise, for the goods so obtained, as he might have had by the common law.

And two justices (1 Q.) may call and convent by process or otherwise (A), to the assizes or sessions, any person suspected, and commit or bail him to the next assizes or sessions.

Get into his hands or possession] A person endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on suspicion of such fraud, before he hath got the goods into his possession, seems not to be within this statute. *E. 3 G. 2. K. and Brian. Sess. C. V. 2. 27.*

False privy token] On motion to quash an indictment, which was, that the defendant came pretending that such a person had sent him to receive 20*l.* and received it, whereas such person did not send him: By the court, It is not indictable, unless he came with *false tokens*; for we are not to indict one man for making a fool of another. *Black. 79.*

H. 13 G. 2. K. and Munoz. It was adjudged, that an indictment averring the offence to be by false tokens, without shewing what those false tokens are, is not sufficient; and that the fraudulently procuring a note from a person, by falsely affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no such person in the next room, is not a *false token*, but a false affirmation only. *Sess. C. V. 2. 201. Str. 1127.*

Note; The statute says, a false *privy token*.

Corporal pain] Lord Coke observes hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. *3 Inst. 133.*

But Mr. *Hawkins* observes, that there is a precedent in *Cro. Car. 564.* by which it appears, that one convicted on such a prosecution hath been adjudged not only to stand on the pillory, but also to pay a fine of 500*l.* and to be bound with good sureties to the good behaviour. *1 Haw. 288.*

Commit or bail him] In this case the justices shall do well to take examination of the offence, and to certify the
same

same to the sessions or gaol delivery, and withal to bind over the informers and witnesses to give evidence therein.

Dalt. c. 32.

2. By the 30 G. 2. c. 24. All persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person, money, goods, wares, or merchandizes, with intent to cheat or defraud any person of the same; or shall knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with intent to extort from him any money or other goods; shall be deemed offenders against law and the publick peace: and the court before whom any such offender shall be tried, shall on conviction order him to be fined and imprisoned, or to be put in the pillory, or publicly whipped, or to be transported as soon as conveniently may be for seven years. *f. 1.*

And any justice, before whom any person charged on oath with having committed any of the offences intended by this act to be punished shall be brought, shall examine by oath and such other lawful means as to him shall seem meet touching the matters complained of, and deal with the offender according to law: and if the party charged as being the offender shall be committed to prison, or admitted to bail, to answer the matters complained of at the next sessions or assizes; the said justice shall bind over the prosecutor to appear and prosecute such offender with effect; and if such goods so fraudulently obtained appear to such justice to exceed the value of 20*l.* the recognizance shall be in not less than double the value of the goods.

f. 2.

And if any person shall knowingly and designedly pawn, or exchange, or unlawfully dispose of the goods of any other person, not being employed or authorized by the owner so to do, and shall be thereof convicted by the oath of one witness, or confession before one justice; he shall forfeit 20*s.* and if not forthwith paid, the said justice shall commit him to the house of correction, or some other publick prison of the place where he shall reside or be convicted, there to remain and be kept to hard labour for fourteen days, unless the forfeiture shall be sooner paid: and if within three days, before the expiration of the said fourteen days the said forfeiture shall not be paid; the said justice, upon application of the prosecutor, shall order him to be publicly whipped in such house of correction or prison, or in some open publick place of the city, division,

town or place wherein the offence shall have been committed, as to such justice shall seem proper. The said forfeitures, when recovered, to be applied towards making satisfaction thereof to the party injured, and defraying the costs of the prosecution, as shall be adjudged reasonable by such justice; but if the party injured shall decline to accept of such satisfaction and costs, or if there be any overplus of the same, then such forfeitures or overplus shall be paid to the overseers for the use of the poor of the parish or place where the offence was committed. *f. 3.*

And every person who shall take any goods by way of pawn, pledge, or exchange, shall forthwith enter or cause to be entered in a fair and regular manner, in a book to be kept for that purpose, a description of such goods, and the sum advanced thereon, the day and year, and the name and place of abode of the person by whom they were pawned, and also the name and place of abode of the owner according to the information of the person so pawning the same; and shall at the same time give a duplicate or copy to the person so pawning the same, if required; on paying to him an halfpenny if the goods are pawned for less than 20s. and a penny if pawned for 20s. and not more than 5l. and 2d. if for any larger sum: And in default of making such entry and giving such duplicate or copy if required, he shall forfeit 5l. by distress by warrant of one justice, to be applied to the use of the poor as aforesaid. *f. 4.*

And if in the course of any of the aforesaid proceedings before any justice in pursuance of this act, it shall appear or be proved to the satisfaction of such justice upon oath, that any of the goods so pawned are become or have been rendered of less value than the same were at the time of pawning thereof, through the default, neglect, or wilful misbehaviour of the person to whom they were pawned; the said justice shall award a reasonable satisfaction to the owner in respect of such damage, and the sum so awarded shall be deducted out of the principal, and interest, and allowance for warehouse room, which shall appear to be due to the person to whom they were pawned; and it shall be sufficient for the pawner to pay or tender the money upon the balance, after deducting out of the principal and interest, and money paid for warehouse room as aforesaid, such reasonable satisfaction in respect of such damage as such justice shall order, and upon so doing, the justice shall proceed as if he had tendered the whole.

f. 5.

And

And if any person shall knowingly buy or take in as a pledge, any linen or apparel intrusted to any other person to wash, scour, iron, mend, or make up; and shall be convicted thereof, on the oath of one witness, or confession, before one justice: he shall forfeit double the sum given or lent on the same, to the poor, to be recovered as other forfeitures by this act; and shall be obliged to restore the said goods to the owner in presence of the justice.

f. 6.

And if any person who shall offer by way of pawn, pledge, exchange, or sale, any goods, shall not be able or shall refuse to give a satisfactory account of himself, or of the means by which he became possessed thereof; or if there shall be any other reason to suspect that such goods are stolen, or otherwise illegally or clandestinely obtained: it shall be lawful for any person, his servants or agents to whom the same shall be offered, to seize and detain such person and the said goods, and to deliver him as soon as conveniently may be into the custody of the constable or other peace officer, who shall immediately convey such person and the said goods before a justice; and if such justice shall upon examination and inquiry have cause to suspect that the said goods were stolen or illegally or clandestinely obtained, he may commit him to safe custody for any time not exceeding six days in order to be further examined; and if upon either of the said examinations it shall appear to the satisfaction of such justice, that the said goods were stolen or illegally or clandestinely obtained, he shall commit the offender to the common gaol or house of correction, there to be dealt with according to law. Provided nevertheless, that if such goods so seized and detained as aforesaid shall afterwards appear to be the property of the person who offered the same to be pawned, exchanged, or sold, or that he was authorized by the owner thereof to pawn, exchange, or sell the same; the person who shall so seize or detain the party who offered the said goods shall be indemnified for having so done.

f. 7, 8.

And if the owner of any goods unlawfully pawned, pledged, or exchanged, shall make out either on his oath, or by the oath of one witness before one justice, that such owner hath or hath had his goods unlawfully obtained or taken from him, and that there is just cause to suspect that any person within the jurisdiction of such justice hath knowingly and unlawfully taken to pawn, or by way of pledge, or in exchange, any goods of such owner, and without his privity or authority; and make appear

to the satisfaction of such justice, probable grounds for such the owner's suspicion: such justice may issue his warrant for searching in the day time the house, warehouse, or other place of any such person so charged as aforesaid; and if the occupier of such house, warehouse, or other place shall, on request to him made to open the same by any peace officer authorized to search there by warrant of such justice, refuse to open and permit the same to be searched, it shall be lawful for such peace officer to break open any such house, warehouse, or other place in the day time, and to search as he shall think fit therein for the goods suspected to be there, doing no wilful damage; and if any person shall oppose or hinder any such search, and shall be thereof convicted before one justice by the oath of one witness, he shall forfeit 5*l.* and if the same shall not be immediately paid down, or within the space of 24 hours, the justice shall commit him to the house of correction or some other publick prison, there to be kept to hard labour for any time not exceeding one month, nor less than five days, unless in the mean time the forfeiture shall be paid, and such forfeiture, when recovered shall go to the poor: and if upon such search any of the goods shall be found, and the property of the owner shall be made out to the satisfaction of such justice by the oath of one witness or confession, such justice shall thereupon cause the same to be forthwith restored to the owner. *f. 9.*

And if any goods shall be pawned or pledged for securing any money lent thereon, not exceeding in the whole the principal sum of 10*l.* and the interest thereof; and if within two years after the pawning thereof (proof having been made on oath by one witness, or by producing a duplicate of the entry directed to be given by this act as aforesaid, before any such justice, of the pawning of such goods within the said space of two years) any such pawner who was the real owner of such goods at the time of the pawning thereof, shall tender to the person who lent on security of the said goods the principal money borrowed thereon, and all interest due for the same, together with such charges for the warehouse room of the goods pawned as shall be agreed on at the time of pawning the same; and the person who took the goods in pawn shall thereupon neglect or refuse to deliver back the goods so pawned for any sum not exceeding the said principal sum of 10*l.* to the person who borrowed the money thereon; then, and in such case, on oath thereof made by the pawner, or some other credible person, any justice of the place where the person who took such pawn shall dwell,

dwel, on the application of the borrower, shall cause such person to come before him, and shall examine on oath the parties themselves, and such other credible persons as shall appear before him, touching the premises: and if tender of the principal and interest, and charges for warehouse room as aforesaid, shall be proved by oath to have been made as aforesaid, within the said space of two years; then on payment by the borrower of such principal money and the interest due thereon, together with such charges for warehouse room as aforesaid, to the lender, and in case the lender shall refuse to accept thereof on tender before such justice, the said justice shall thereupon, by order under his hand, direct the goods so pawned forthwith to be delivered to the pawner: and if the lender shall neglect or refuse to deliver up, or make satisfaction for such goods as aforesaid, as such justice shall order; then he shall commit the party refusing to the house of correction, or some other publick prison, until he shall deliver up the said goods according to the order of such justice, or make satisfaction for the value thereof to the party intitled to the redemption. *f. 10.*

But if any pawn or pledge of goods, made by or for the proprietor, shall remain unredeemed for two years, the same shall be forfeited; and the person to whom they were pawned may sell the same; subject nevertheless to account for the overplus, if any shall be, of the produce of all such goods which have been pledged for 2*l.* and upwards, as by this act is directed. And he shall enter in a book to be kept for that purpose, a just account of the sale of all such goods, expressing the day when, the money for which, and the name and place of abode of the person to whom the same were sold: and if they be sold for more than the principal and interest, and charge of warehouse room, the overplus shall be paid on demand to the person on whose account such goods were pawned; who shall for his satisfaction be permitted to inspect the entry to be made as aforesaid of such sale, paying for such inspection the sum of one penny, and no more; and if any person shall refuse to permit such person who pawned the goods to inspect such entry (such person, if he be an executor, administrator or assignee, at such time producing his letters testamentary, letters of administration or assignment); or if the goods were sold for more than the sum entered in such book; or if such person shall not make such entry, or shall not have *bona fide* sold the goods for the best price that he might have reasonably got for the same, without his wilful default; or shall refuse to pay such overplus on demand

as aforesaid; he shall forfeit treble the value of such goods to the person by whom, or on whose account they were pawned, to be recovered in any of his majesty's courts of record at *Westminster*. f. 11, 12.

Provided, that no fee or gratuity shall be taken for any summons or warrant, granted by any justice in pursuance of this act, so far as the same relates to goods pawned, pledged, taken in exchange, or unlawfully disposed of. f. 13.

And any justice, unto whom complaint upon oath shall be made of any offence committed against this act, shall issue his warrant for bringing before him, or some other justice of such place, the person charged with such offence; and the justice before whom he is brought, shall hear and determine the matter, and proceed to judgment and conviction: and if it shall appear, upon oath, to the satisfaction of such justice, that any person within his jurisdiction can give material evidence on behalf of the prosecutor, or of the person accused, and who will not voluntarily appear; he shall issue his summons to convene him to give his evidence; and if he shall neglect or refuse to appear on such summons, and no just excuse shall be offered, then (on proof upon oath of the summons having been duly served upon him) he shall issue his warrant to bring such witness before him; and on his appearance, if he shall refuse to be examined on oath, without offering just cause for such refusal, the justice shall commit him to the publick prison for any time not exceeding three months: and if on such examination the justice shall deem the evidence of any such witness to be material, he may bind over such witness, unless a feme-covert, or under the age of 21 years, by recognizance in a reasonable penalty, to appear and give evidence, at the next sessions or assizes. f. 16.

And no person charged on oath with being guilty of any of the offences punishable by this act, and which shall require bail, shall be admitted to bail before 24 hours notice at least shall be proved by oath to have been given in writing to the prosecutor, of the names and places of abode of the persons proposed to be bail for any such offender, unless the bail offered shall be well known to the justice, and he shall approve of them. And every such offender who shall be bound over to the sessions or assizes, shall be tried at the next sessions or assizes to be held after his being apprehended, unless the court shall think fit to put off the trial on just cause made out to them.

f. 17.

And

And in all proceedings on this act, any person shall be admitted to be a witness, notwithstanding his being an inhabitant of the place wherein the offence shall have been committed. *f. 18.*

And the justice before whom any person shall be convicted upon this act, shall cause the conviction to be drawn up in the form, or to the effect following;

———— { *Be it remembred, that on this ——— day of ———*
To wit, { in the ——— year of his majesty's reign, A. B.
is convicted before ——— of his majesty's justices of the peace
for the said county of ——— [or, for the riding, or division,
of the said county of ——— or, for the city, liberty, or town
of ——— as the case shall be] for ——— and ——— the
said ——— do adjudge him or her to pay and forfeit for the
same, the sum of ———. Given under ——— the day and
year aforesaid.

The same to be written upon parchment, and transmitted to the next sessions, to be filed amongst the records; and if any person shall appeal to the said sessions, the justices there shall, upon receiving the said conviction, proceed to hear and determine the matter. *f. 19.*

And no certiorari shall be granted, to remove any proceedings on this act. *f. 20.*

And if any person convicted of any offence punishable by this act, shall think himself aggrieved by the judgment of the justice before whom he shall have been convicted, he may appeal to the next sessions, and the execution of the judgment shall in such case be suspended, the person convicted entering into recognizance at the time of the conviction, with two sureties in double the sum he shall have been adjudged to pay, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the said sessions: and the sessions shall award such costs as shall appear just and reasonable to be paid by either party; and if the judgment shall be affirmed, the appellant shall immediately pay the sum adjudged to be forfeited, together with such costs as the court shall award, or, in default thereof, shall suffer the pains and penalties by this act inflicted upon persons respectively, who shall neglect to pay, or shall not pay the forfeitures by this act to be paid. *f. 21.*

And persons sued for any thing done on this act, may have double costs. *f. 22.*

And justices acting under this statute shall be indemnified as by the 24 G. 2. c. 44. And no suit shall be commenced
against

against any peace officer for any thing done in the execution of this act, until notice in writing shall have been given to him, or left at his usual place of abode by the attorney employed against him; which notice shall contain the name and place of abode of the person who is to bring the action, together with the cause of action; and the name and place of abode of the attorney shall be underwritten or indorsed thereon; and such peace officer may, at any time within 14 days after such notice, tender or cause to be tendred any sum as amends for the injury complained of, to the party complaining, or to the said attorney; and if the same is not accepted of, the defendant may plead such tender in bar of such action, together with the general issue, or any other plea, with leave of the court; and if the jury shall find the amends to have been sufficient, or otherwise the plaintiff shall fail in the action, he shall have his costs; and if the plaintiff shall prevail he shall have such damages as the jury shall think proper, together with full costs. *f.* 23.

A. Warrant of two justices to apprehend an offender; on 33 *H. 8. c. 1.*

Westmorland. { To the constable of ———.

WHEREAS complaint hath been made unto us whose names and seals are hereunto set, two of his majesty's justices of the peace for the said county, and one of us of the quorum, upon the oaths of A. I. of ——— yeoman, and B. I. of ——— yeoman, that on the ——— day of ——— A. O. of ——— yeoman, did by a false privy token [or, counterfeit letter] that is to say, by [here particularize the offence] falsely and deceitfully obtain and get into his hands and possession [here mention the things] from C. I. of ——— contrary to the statute in that case made: These are therefore to command you, upon sight hereof, forthwith to bring the said A. O. before us at ——— on the ——— day of ——— to answer to the said complaint, and farther to be dealt withal according to law. Given under our hands and seals the ——— day of ———.

Cheese. See Butter.

Chocolate. See Excise.

Church and church yard.

1. **T**HE ancient Saxon word is *cyrce*, the Danish *kirke*, the Belgick *kercke*, the Cimbric *kirchia* or *kurk*; probably from the Greek word *κυριακόν*, belonging to the lord, or *κυρίῳ οἴκῳ*, the lord's house: so that we have lost the ancient pronunciation of the word (except in the northern parts of *England*, and in *Scotland*) by softening the letters *c* or *ch*, as we have done in many cases; which letters the ancient *Greeks* and *Romans* always pronounced hard, as the letter *k*.

2. In cities and towns corporate, the bishop (with the consent of the mayor, aldermen, and justices of the peace, and of the patron) may unite two churches or chapels; and make order with the like consent, that the patrons present by turns, having regard to the value of the livings united: and the incumbents thereof shall be graduates. 17 C. 2. c. 3. Uniting of churches.

3. Clauses are commonly inserted in the several acts of parliament for making provision for the rectors of new churches, which clauses give certain powers to justices of the peace, in relation to the assessments to be made for that purpose. New churches.

4. No fairs nor markets shall be kept in church yards. 13 Ed. 1. ft. 2. c. 6. Markets in the church yard.

5. Clergymen shall not be arrested, and drawn out of any church or church yard, whilst they attend to divine service; on pain of imprisonment of the offender, and ransom at the king's will, and satisfaction to the party arrested. 50 Ed. 3. c. 5. 1 R. 2. c. 15. Arrest in the church or church yard.

Also it is said, that arrests in civil cases ought not to be of persons going to or coming from church; but that a warrant from a justice of the peace for the king may be executed in such case. *Cro. Car.* 602. *Cro. Ja.* 321. 2 Bulst. 72.

But altho' the officer may be punished for the same either in the spiritual or temporal courts, yet the arrest (if not on a Sunday) is good in law. *Watson c.* 34. p. 344.

6. If any person shall, by words only, quarrel, chide, or brawl, in any church or church yard, the bishop (on proof of two witnesses) may suspend every layman, being an offender, ab ingressu ecclesiæ; and every clergyman from the ministration of his office, so long as he shall think meet. 5 & 6 Ed. 6. c. 4. f. 1. Brawling in the church or church yard.

7. If any shall smite, or lay any violent hands on another in any church or church yard, he shall be deemed ipso facto excommunicate, Striking in the church or church yard.

excommunicate, and be excluded from the fellowship and company of Christ's congregation. 5 & 6 Ed. 6. c. 4. f. 2.

Lay any violent hands] But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of this statute. 1 *Haw.* 139.

Shall be deemed ipso facto excommunicate] And he shall not excuse himself by shewing that the other assaulted him. 1 *Haw.* 139.

Ipso facto] Nevertheless, in this and other like cases, there ought either to be a precedent conviction at law, which must be transmitted to the bishop; or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof, till he be found guilty upon a lawful trial. 1 *Haw.* 139.

Striking with a
weapon in the
church or church
yard.

8. *If any shall maliciously strike another with any weapon, in any church or church yard, or shall there draw any weapon with intent to strike, and shall be convicted thereof by verdict of 12 men, or confession, or by two witnesses, before the judges of assize, or justices of the peace in their sessions, he shall be adjudged to have one of his ears cut off; and if he have no ears, he shall be burned in the cheek with an hot iron having the letter F, whereby he may be known and taken for a fray maker and fighter; and he shall also stand ipso facto excommunicate.* 5 & 6 Ed. 6. c. 4. f. 3.

Sacrilege:

9. He who steals goods belonging to a parish church, may be indicted for stealing the goods of the parishioners. 1 *Haw.* 94.

For other matters, see title **Churchwardens.**

Churchwardens.

I. *Who are exempted from being churchwardens.*

II. *Choosing and swearing of churchwardens, with their duty thereupon.*

III. *Their duty in levying rates; and therein of vestries, and select vestries.*

IV. *Their*

IV. Their duty as to repairs; and therein concerning church seats.

V. Their duty as to sundry other matters.

VI. Concerning presentments; and therein of siders-men or assistants.

VII. *Their accounting.*

VIII. *Their punishment on misbehaviour.*

IX. Their indemnity on doing their duty.

I. Who are exempted from being churchwardens.

i. **A** Counsellor, or attorney, ought not to be chosen Attorneys, churchwarden; and if he is, he may have a prohibition, by reason of his attendance on the courts at *Westminster*. 2 Roll's Abr. 272.

2. Apothecaries, who have served 7 years, shall be exempted from the office of churchwarden. 6 W. c. 4. Apothecaries and surgeons.

And by the 18 G. 2. c. 15. Freemen of the corporation of surgeons in *London* are exempted from being churchwardens.

3. Dissenting teachers or preachers, in holy orders, or pretended holy orders, being duly qualified, are exempted from the office of churchwarden. *1 W. 4. c. 1.*

4. Other dissenters, scrupling to take upon them the Other dissenters!
office, may execute the same by a sufficient deputy, to be
approved of in like manner as other churchwardens. I W.
scff. I. c. 18.

5. All persons who have prosecuted a felon to conviction, are exempted from the office of churchwarden, in the parish where the offence was committed. 10 & 11 IV. c. 23. s. 2.

6. By the 2 G. 3. c. 20. which is of force for 7 years, ^{Person serving in}
 &c. No private man, personally serving for himself in ^{the militia.}
 the militia, during the time of such service, shall be liable
 to serve as churchwarden.

II. Choosing and swearing churchwardens; with their duty thereupon.

1. Churchwardens to be chosen yearly in *Easter* week, when to be chosen, and by the joint consent of the parishioners, if it may be; but if there shall be any dissent, then by the majority of the whole, and the parishioners are to be sworn.

But where there is a custom for the parishioners to chuse both, that custom shall continue. *Gibf. Codex* 242.

Refusing to take the office.

2. A person chosen churchwarden, refusing to take his office and oath, may be excommunicated for the refusal; and no prohibition will lie. *Gibf.* 243.

Refusing to swear them.

3. And the ecclesiastical judge, refusing to swear him, may be compelled by a mandamus. *Gibf.* 243.

Churchwardens oath.

4. The churchwardens oath, as said to have been agreed on, upon mutual consultation between the civilians and common lawyers, is as follows:

“ You shall swear truly and faithfully to execute the office of a churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm: So help you god and the contents of this book.” *Gibf.* 243.

Churchwardens a body corporate.

5. Churchwardens being thus sworn, are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them; and also to purchase goods for the use of the parish; but they are not a corporation in such sort as to purchase lands, or take by grant, except in London by custom. *Gibf.* 241.

How long they shall continue.

6. Churchwardens shall continue in office, till the new churchwardens be sworn. *Can.* 118.

III. Their duty in levying rates; and therein of vestries, and select vestries.

Summoning a vestry.

1. The rates must be made with the consent of the major part of the parishioners, housekeepers, or occupiers of land. In order to which, publick notice of a vestry (a place so called from the vestments of the minister kept there) ought to be given the Sunday before, either in the church after divine service is ended, or else at the church door as the parishioners come out; both of the calling of the said meeting, and also of the time and place of the assembling of it. And it will be fairest then also to declare for what business the said meeting is to be held, that no one may be surprized, but that all may have full time before, to consider of what is to be proposed at the said meeting. And it is usual that for half an hour before it begins, one of the church bells be tolled to give the

the parishioners notice when they are met. 5 Co. 67.

Par. L. 54.

2. At the common law, every parishioner who paid to the church rates, and no other, had a right to vote. *Par. L. 56.* And those that pay no church rates shall have no vote in affairs relating to it, except it be the rector or vicar. *Wood b. 1. c. 7.* Who shall have a vote in the vestry.

3. All persons who have a vote in the vestry have an equal right, and neither the minister nor churchwardens, without a special custom, can adjourn the vestry; but this can only be done by a majority of the whole assembly. *Str. 1047.* Who may adjourn the vestry.

4. When the churchwardens and parishioners are there met, they are to consider what sum of money it will be necessary to raise for such repairs as shall then be needful; and after they have agreed what sum is fit, they are to make an equal levy. *Degge 171.* Laying the rates.

5. And the major part of them that appear, shall bind the parish; or if none appear, the churchwardens alone may make the rate; because they, and not the parishioners, are to be cited and punished, in defect of repairs. *Gibf. 220.* Majority to bind the parish.

6. It is most convenient, that every parish act there be entred in the parish book of accounts, and every man's hand consenting to it be set thereto; for then it will be a certain rule for the churchwardens to go by. *Par. L. 55.* Entring in a book.

7. By custom there may be select vestries, of a certain number of persons elected yearly, to make rates, and manage the concerns of the parish for that year: and such custom is a good custom. *Read. Ch. Service. Gibf. 246. Str. 728.* Select vestry.

8. It is holden, that a rate for the reparation of the fabrick of a church is real, charging the land, and not the person; but a rate for ornaments is personal, upon the goods, and not upon the land. *Gibf. 220.* Two rates; one for the fabrick, another for ornaments.

And in *Jessrey's case*, 5 Co. 67. it was solemnly adjudged, that the rates for the repair of the church shall be laid upon every occupier of lands in the parish, altho' such occupier live in another parish; and such person may come to the vestries of the parishioners, and vote in the making a rate: but he shall not be charged towards the ornaments of the church, as for bells, repair of seats, bread and wine, clerk's wages, visitation charges, and the like, by reason of such lands; for that the personal estates of the inhabitants are chargeable with every thing that doth not relate to the fabrick of the church, or repairs of the

ferences of the church yard, or such other things as concern the freehold.

And therefore some have been of opinion, that churchwardens should make two rates; one upon lands and houses, which may concern the freehold of the church, and another upon personal estates and stock, to defray other expences. But as this method creates confusion, so it is seldom practised.

And Sir *Simon Degge* says, that he conceives the law to be clear otherwise; and that a foreigner who holds lands in the parish is as much obliged to pay towards the bells, seats, and ornaments, as to the repair of the church; otherwise there would be great confusion in making several levies, which he never observed to be practised within his knowledge. But he leaves it a query, among a diversity of opinions. *p. 173.*

And Mr. *Shaw*, in his parish law, having cited the authors who hold these different opinions, says, that the practice generally now goes according to the opinion last mentioned, namely, that foreigners occupying lands within the parish shall be charged to both; and that the ecclesiastical judges, as well as the temporal, for the ease and convenience which accrues from the making of one levy for all, do give countenance hereto, and begin to treat the contrary opinion as obsolete and out of doors. *p. 92.*

Equal pound
rate.

9. A taxation by the pound rent is the most equitable way, and not according to the quantity of the land. *Wood b. 1. c. 7.*

Tenant to be
charged, and not
the landlord.
Impropriator
how far charge-
able.

10. Where lands are in farm, not the lessor, but the tenant shall be rated and pay. *Gibf. 221.*

11. An impropriator, tho' bound to repair the chancel, is also bound to contribute to the reparations of the church, if he hath lands in the parish, which are not parcel of the parsonage. *Gibf. 221, 223.*

Appeal against
the rates.

12. If any person find himself aggrieved at the inequality of the assessment, his appeal must be to the ecclesiastical judge. *Degge 172.*

And in such case, if he will be relieved, he must shew, that he is illegally or unequally taxed in respect of the quantity of his land, as being rated for more than he has, or that the land which he hath is over rated, or that the rate was needless, or that some lands in the parish are omitted in the rate. *Wood b. 1. c. 7.*

Rate how to be
covered.

13. If any refuse to pay the rates, being demanded by the churchwardens, they are to be sued for in the ecclesiastical

ecclesiastical courts, and not elsewhere. *Gibf.* 219. *Degge* 171.

Also a quaker, refusing to pay church rates, may be sued, as other parishioners, in the ecclesiastical court; or he may be prosecuted before the justices of the peace, in the same manner as for his tithes.

IV. Their duty as to repairs; and therein concerning church seats.

1. Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the parishioners; and the disposing of the seats therein, the right of the ordinary. *Gibf.* 221. Who shall repair,

2. The spiritual court may compel the parishioners to repair the body of the church, and may excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved, till the greater part agree to a tax. *Read.* Ch. Service. Who may compel the repairs to be made.

3. If the churchwardens erect or add any thing new, either to the fabrick of the church, utensils, or church yard, they must have the consent of the parishioners; and if such additions are in the church, the bishop's licence is also necessary. But where necessary repairs are wanting, the greater part of the parish will bind the less; and if the major part will not consent, where repairs are necessary, the churchwardens may repair without their consent, if upon notice given they refuse to meet, or when they are met, refuse to make a rate. But if a church fall down, the parishioners are not bound to rebuild it. *Read.* Ch. Service. 1 *Vent.* 367. Difference between adding something new, and repairing the old.

4. But if a church be so much out of repair, that it is necessary to pull it down, or so little, that it needs to be enlarged, the major part of the parishioners may make a rate for new building, or enlarging, as there shall be occasion. This was declared in the 29 C. 2. by all the three courts successively; notwithstanding the cause was laboured by a great number of quakers, who opposed the rate. *Gibf.* 221. Majority may rebound.

5. The parson, that is, the spiritual rector, as also the lay impropriator, are bound by common right to repair the chancel, and is thereupon intitled to the chief seat therein, unless another hath it by prescription; yet he hath not the disposal of the seats therein, but the bishop. *Gibf.* 223, 224. Repairing the chancel.

Repairing an isle.

6. An isle in a church, which hath time out of mind belonged to a particular house, and been maintained and repaired by the owner of that house, is part of his frank tenement, and the ordinary cannot dispose of it, or intermeddle in it. *Gilf.* 221.

Seat inseparable from the house.

7. A seat, or priority in a seat, in the body of the church, may be prescribed for as belonging to a house, if it hath been used, and also repaired, time out of mind, by the inhabitants of such house. *Gilf.* 221.

And no one can claim a seat in a church by prescription, as appendant or belonging to land; but it must be laid as belonging to a house, in respect of the inhabitancy thereof. *Wood b. 1. c. 7.*

And therefore a seat may not be granted to a person and his heirs absolutely; for the seat doth not belong to the person, but to the inhabitant. *Gilf.* 221.

V. Their duty as to sundry other matters.

Overseer.

1. Every churchwarden is an overseer of the poor, altho' every overseer of the poor is not a churchwarden. 43 *El. c. 2. f. 1.*

And in *M. 15 C. 2.* A churchwarden was committed by the two next justices, as churchwarden, for refusing to account for the money received and disbursed by him; but on an *habeas corpus* he was discharged: because by the warrant of commitment it ought to appear that he was overseer of the poor, for by the statute of 43 *El.* that is annexed to his office of churchwarden, and the justices have no jurisdiction over him as churchwarden, but as overseer. *Dalt.* 186.

Church way.

2. They are to see that the church ways be well kept and repaired. And the right to a church way may be claimed and maintained by a libel in the spiritual court. 2 *Roll's Abr.* 287.

Vacancy.

3. Churchwardens have the care of a benefice during its vacancy: Having first taken out a sequestration from the spiritual court, they are to manage all the profits and expences of the benefice for him that shall next succeed; plow and sow his glebe; take in the crop; collect tithes; thrash out and sell corn; repair houses and fences, and the like. And they shall take care that during the vacancy the church shall be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. And if the successor thinks himself aggrieved by them, he may appeal to the ecclesiastical judge. *Par. L. 99. Comp. Par. Off.* 90.

4. They

4. They (or the constable) shall levy the penalties for worldly calling^{*} persons exercising their worldly calling on the lord's day, on the lord's day
29 C. 2. c. 7.

5. They shall suffer no plays, feasts, banquets, suppers, church ales, drinkings, temporal courts or leets, lay juries, musters, or any profane usage to be kept in the church or church yard. *Can.* 88. ^{Profanation of the church.}

6. They shall see that the parishioners resort to church, and continue there orderly, during divine service; and shall present the defaulters. *Can.* 90. ^{Attending divine service.}

7. They shall not suffer any idle persons to abide either in the church yard, or church porch, during the time of divine service or preaching; but shall cause them to come in, or to depart. *Can.* 19. ^{Loitering in the church yard.}

8. They shall levy the forfeiture of 12 d. a Sunday, on the goods of persons not coming to church. 1 *El.* c. 2. ^{Levying 12 d. a Sunday for not coming to church.}

9. They (or the constable) shall levy the penalty of 3 s. 4 d. for using unlawful pastimes on the lord's day. 1 *C.* c. 1. ^{Sports on the lord's day.}

10. They (or the constables or overseers) shall levy the penalties for being present at unlawful conventicles. 22 *C.* 2. c. 1. ^{Conventicle.}

11. They shall, on pain of 20 l. present at the sessions once a year, the monthly absence from church of all recusants, and the names and ages of their children above nine years old, and the names of their servants. And if the party, presented shall be indicted and convicted, the churchwarden shall have a reward of 40 s. to be levied of the recusant's goods, by warrant of the justices in sessions. 3 *J.* c. 4. ^{Recusants.}

12. They shall keep excommunicated persons out of the church. *Can.* 85. ^{Excommunicate persons.}

13. They shall take care to have in the church a large bible, book of common prayer, book of homilies, a font of stone, a decent communion table, with proper coverings, the ten commandments set up at the east end, and other chosen sentences upon the walls, a reading desk, and pulpit, and chest for alms; all at the charge of the parish. *Can.* 80, 81, 82, 83, 84. ^{Ornaments of the church.}

14. They ought to keep the keys of the belfry, and to take care that the bells be not rung without good cause, to be allowed by the minister and themselves. *Can.* 88. ^{Bells.}

15. They shall have a box, wherein to keep the register, with three locks and keys, two keys to be kept by them, and one by the minister; and every Sunday they shall see that the minister enter therein all christnings, weddings, and burials that have been the week before; and at the bottom of every page, they shall (with the minister) subscribe their names. And they shall, within a month after

March 25. yearly, transmit to the bishop a copy thereof for the year before, subscribed as above.

And such register, being carefully preserved, is good evidence; and the falsifying of it is punishable at the common law. *Gibf.* 229.

- Communion.** 16. They shall, at the charge of the parish, with the advice and direction of the minister, provide bread and wine against the communion. *Can.* 20.
- Incumbent.** 17. They (or the overseers) shall levy the penalty of 5*l.* for an incumbent not reading the common prayer once a month. 13 & 14 *C. 2. c. 4.*
- Charity briefs.** 18. They shall collect money on charity briefs, on pain of 20 *l.* 4 *An. c. 14.*
- Strange preachers.** 19. They shall not suffer any strangers to preach, but such as shall appear qualified on shewing their licence; and they shall see that such preachers register or subscribe their names in a book to be kept for that purpose, with the day when they preached, and the bishop's name who granted the licence. *Can.* 50, 52.
- Burying in woollen.** 20. They shall, on certificate from the minister, apply to the magistrates, for conviction of offenders in not burying in woollen. 30 *C. 2. c. 3.*
- Persons denied christian burial.** 21. Persons who murder themselves, or die excommunicated, are denied christian burial; and therefore the churchwardens are not to suffer them to be buried in the church or church yard, without special licence from the bishop. *Degge* 183.
- Eating flesh on fish days.** 22. They shall levy the penalties for eating flesh on fish days. 5 *El. c. 5.*
- Unlicensed alehouse.** 23. They (or the constable) shall levy the penalty for keeping an unlicensed alehouse. 3 *C. c. 3.*
- Gaming.** 24. They shall receive the penalties for servants, labourers, apprentices, or journeymen gaming in publick houses. 30 *G. 2. c. 24.*
- Drunkenness.** 25. They shall receive the penalties for tipling and drunkenness. 4 *J. c. 5.* 21 *J. c. 7.*
- Suffering tipling.** 26. They (or the constable) shall levy the penalty for suffering tipling. 1 *J. c. 9.*
- Spirituous liquors.** 27. They shall receive the penalties for hawking spirituous liquors. 9 *G. 2. c. 23.*
- Corn.** 28. They (or the overseers) shall levy the penalty for selling corn by a wrong measure. 22 *C. 2. c. 8.*
- Butter and cheese.** 29. They (or the overseers) shall receive the penalties relating to butter and cheese. 13 & 14 *C. 2. c. 26.*
- Foreign cattle.** 30. They, and the overseers, shall distribute amongst the poor foreign cattle imported, forfeited, and killed. 32 *C. 2. c. 2.*

31. They (or the overseers) shall levy the penalties relating to weights and measures. 16 G. c. 19. 22 C. 2. Weights and measures.
32. They shall carry hawkers and pedlars trading without licence, before a justice of the peace. 9 & 10 H. c. 27. Hawkers and pedlars.
33. They shall provide chests wherein to lock up the arms, clothes, and accoutrements of the militia. 2 G. 3. Militia.
34. They, together with the minister, are to sign certificates for the out-pensioners of *Greenwich* hospital, residing within their parish, with respect to the identity of their persons, in order to the receiving of their pensions. Greenwich hospital.
35. They (or the overseers) shall pay to the high constables the general county rate, out of their money collected for the poor. 12 G. 2. c. 29. County rate.
36. They shall receive the penalty for servants carelessly firing houses. 6 An. c. 31. Servants firing houses.
37. They shall receive the penalties for tracing hares in the snow (and other game penalties.) 1 J. c. 27. Tracing hares.
38. They shall join with the constable and surveyor of the highways in chusing and returning new surveyors, Surveyors of the highways.

VI. Of presentments; and therein concerning sidesmen or assistants.

1. Churchwardens by their oath are to present or certify to the bishop, or his officer, all things presentable by the ecclesiastical laws, which relate to the church, minister, and parishioners. Oath to present.
2. The articles delivered to them for their direction, are for the most part founded on the book of canons made in the year 1603, and the rubricks of the common prayer. Book of articles.
3. There are also several things which they are bound to present by act of parliament; as tipling or drunkenness by the statute of 4 J. c. 5. recusants by 3 J. c. 4. Statute presentments.
4. They may present as often as they please, but shall not be obliged above once a year where it hath so been used, and not above twice any where; except it be at the bishop's visitation. *Can.* 116, 117. When to present.
5. For the presentments of any church or chapel for one year, the register shall have only 4d. *Can.* 116. Fee for taking a presentment.
6. The minister may present where the churchwardens neglect. *Can.* 113. But such presentment ought to be upon oath. 2 Vent. 42. Minister may present.

Sideſmen.

7. In larger pariſhes, there are officers called ſideſmen (anciently ſynodſmen, otherwiſe called queſtmen) to aſſiſt the churchwardens in their enquiries and preſentment of offenders: They ſhall be choſen yearly in Eaſter week by the miniſter and pariſhioners, if they can agree; if not, by the biſhop. *Can.* 90.

Sideſman's oath.

8. The ſideſman's oath, ſaid to have been agreed on by the civilians and common lawyers, is this:

“ You ſhall ſwear, that you will be aſſiſtant to the churchwardens in the execution of their office, ſo far as by law you are bound: So help you god.” *Gibſ.* 242.

Preſentment on common fame.

9. Whereas churchwardens are ſworn, and miniſters charged, to preſent as well crimes and diſorders, as alſo the common fame which is ſpread abroad of them, whereby they are ſometimes troubled by the delinquents or their friends; all judges both eccleſiaſtical and temporal are (by the 115th canon) admoniſhed and exhorted, as they regard and reverence the fearful judgment ſeat of the higheſt judge, that they admit not in any of their courts any ſuit againſt churchwardens or miniſters for any ſuch preſentments; conſidering that they tend to the reſtraint of ſhameleſs impiety, and that the rules of charity and government do preſume they did nothing therein of malice, but for the diſcharge of their conſciences.

But as common fame is often falſe, and as it is better that ten offenders ſhould eſcape than one innocent perſon ſuffer, and as the above canon ſuppoſes that an action may be brought for ſuch preſentment; it ſeemeth good to uſe caution in this matter, unleſs the offence be very notorious.

VII. Their accounting.

When to account.

1. At the end of the year, or within a month after at moſt, they ſhall before the miniſter and pariſhioners (at a veſtry) give up a juſt account of ſuch money as they have received, and alſo what particularly they have beſtowed in reparations, and otherwiſe, for the uſe of the church; and ſhall deliver up to the pariſhioners the money and pariſh goods in their hands, to be delivered over by them to the next churchwardens by bill indented. *Can.* 89.

When compelled to account.

2. And if they reſuſe, they may be preſented at the next viſitation by the new churchwardens; or any of the pariſh that are intereſted may by proceſs call them to account before the ordinary; or the ſucceeding churchwardens may have a writ of account at common law. And if they have diſburſed

disbursed more than they have received, the succeeding churchwardens shall pay what is due to them, and account it among their disbursements. *1 Roll's Abr. 121.*

3. If the custom of the parish is, for a certain number of persons to have the government thereof, and the account is given up to them; the custom is a good custom, and the account given to them a good account. *Gibf. 242.* Accounting to a select vestry.

4. Mr. *Barlow* says, that for disbursements of any sum not above 40s. their own oath is held sufficient proof; but for all sums above, receipts must be produced. *Barl. 105.* Vouchers, But it may be more satisfactory if receipts be produced for all.

5. The allowance of the account may be by entring it in the church book of accounts, and having it signed by those in the vestry who allow the accounts. *Barl. 105.* Allowance of the account.

6. When they have faithfully accounted, and their account is allowed by the minister and major part of the parishioners present, it shall not afterwards be in the power of any to make them account again; unless some fraud in their account is afterwards discovered. *Wood b. 1. c. 7.* Account allowed, final.

E. 7 G. 2. Wainwright and Bagshaw. The churchwardens were cited into the court of *Litchfield* to account. They pleaded, that they had accounted at the vestry according to law. Which plea was rejected; and thereupon a prohibition was granted: for the ordinary is not to take the account, he can only give a judgment that they do account; and to what purpose should they be sent back, to those who have taken their accounts already. *Str. 974, 1133.*

VIII. Their punishment on misbehaviour.

1. If the churchwardens waste the goods of the church, the new churchwardens may call them to an account before the bishop, or bring their action at common law. *Read. Ch. Service.* Churchwardens committing waste.

2. And whereas many churchwardens and overseers, and other persons intrusted to receive collections for the poor, and other publick monies relating to the churches and parishes whereunto they belong, do often mispend the same, to the prejudices of such parishes, and of the poor, and other inhabitants thereof; and the parishioners, who are the only persons sometimes who can make proof thereof, have not been allowed to be witnesses against them: it is enacted, that in all actions to be brought in any court at *Westminster*, or at the assizes, for the recovery

very thereof, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted. 3 *W. c. 11. f. 12.*

Not answerable
for indiscretion.

3. But churchwardens are not answerable for indiscretion, but for deceit only, if they lay out more money than is needful. *Wood b. 1. c. 7.*

IX. Their indemnity on doing their duty.

Double costs.

If any action be brought against any churchwardens, or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office, they may plead the general issue, and give the special matter in evidence; and if a verdict is given for them, or the plaintiff shall be nonsuit, or discontinue, they shall have double costs. 7 *J. c. 5.* 21 *J. c. 12.*

In *Kercheval's case*, *M. 8 Car.* An action was brought against the churchwardens for a presentment upon common fame of incontinency. Upon not guilty, it was found for the churchwardens, and moved, that they might have double costs: But it was resolved, that this being merely ecclesiastical, is not within this statute; for that the statute was never intended, but where they shall be vexed concerning temporal matters, which they shall do by virtue of their office, and not for presentments concerning matters of fame. *Cro. Car. 285, 286.*

Clergy.

I. Clergymen.

II. Benefit of clergy.

I. Clergymen.

Liable to the
poor.

And to the high-
ways.

1. **B**Y the 43 *El. c. 2.* Clergymen are liable to the poor rates, for their glebe and tithe.

2. And Mr. *Hawkins* says, clergymen are within the purview of the statutes relating to the repair of highways, in respect of their spiritual possessions, as much as any other persons whatsoever in respect of any other possessions; for the words are general, and there is no kind of intimation in the said statutes that any particular persons shall be exempted more than others. 1 *Haw. 204.*

3. And

3. And it seems to be now generally settled, that clergymen are liable to all publick charges imposed by act of parliament, where they are not specially excepted. And to other publick charges.

4. No clergyman shall take to farm any lands (except he have not sufficient glebe for the expences of his household;) on pain of 10*l.* a month, half to the king, and half to him that shall sue. *21 H. 8. c. 13.* Shall not farm.

5. No clergymen shall buy to sell again any cattle, corn, fish, wool, wood, victual, or any manner of merchandise; on pain of treble value, half to the king, and half to him that shall sue: and the contract shall be void. *21 H. 8. c. 13.* Shall not buy to sell again.

6. No clergyman shall keep any tanhouse, or any brew-house but for his own house; on pain of 10*l.* a month, half to the king, and half to him that shall sue. *21 H. 8. c. 13.* Shall not keep a tanhouse or brewhouse.

7. The ordinary may punish clergymen for incontinency, by committing them to ward or prison by his discretion. *1 H. 7. c. 4.* May be imprisoned for incontinency.

8. A person, laying violent hands on a clergyman, may be punished in the ecclesiastical court. *13 Ed. 1. Circumspecte agatis. 9 Ed. 3. st. 1. c. 3. 2 Inst. 492.* Privilege against an assault.

9. Clergymen in holy orders may have the benefit of clergy a second, or third time, or oftner. *2 H. H. 374.* May have the benefit of clergy more than once.

10. A clerk in holy orders shall not be burned in the hand, but shall have the same privilege as if he had been burned in the hand; and therefore shall not be drawn in question in the ecclesiastical court to deprive him, or inflict any ecclesiastical censure upon him. *2 H. H. 389.* Shall not be burnt in the hand.

11. To the intent that clergymen may the better discharge their duty in celebration of divine service, and not be intangled with temporal business; if any of them be chosen to any temporal office, he may have his writ to be discharged. *1 Inst. 96.* Shall not serve temporal offices.

12. Ecclesiastical persons have this privilege, that they ought not in person to serve in war. *2 Inst. 4.* Shall not serve in war.

13. Ecclesiastical persons are not bound to appear at the torn, or view of frankpledge. *52 H. 3. c. 10. 9 Ed. 2. c. 3. 2 Inst. 4.* Need not appear at the torn.

14. No clergyman shall be arrested in any church or church yard, whilst he attends to divine service; on pain of imprisonment of the offender, and ransom at the king's will, and gree to the party arrested. *50 Ed. 3. c. 5. 1 R. 2. c. 15.* Shall not be arrested in the church.

But the arrest notwithstanding (if not on a Sunday) is good in law. *Watson c. 34. p. 344.*

Shall not be taken on a statute staple.

Nor on a *capias*.

Sheriff shall not levy on his ecclesiastical goods.

Shall not be amerced of his spiritual goods.

Distresses not to be made on his spiritual inheritance.

Shall not pay toll of his spiritual goods.

Observation.

15. The body of a clergyman may not be taken by force of any process upon a statute staple, or statute merchant. 2 *Inst.* 4.

16. If an action of trespass, debt, account, or other action wherein process of *capias* lies, be brought against a clerk in holy orders, and the sheriff return that he is a clergyman beneficed, having no lay fee in which he may be summoned, in this case the plaintiff cannot have a *capias* to arrest his body, but a writ to the bishop to compel him to appear. 2 *Inst.* 4. *Degge* 157.

17. If a person be bound in recognizance in the chancery, or in any other court, and he pay not the sum at the day; by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop to levy the same of his ecclesiastical goods. 2 *Inst.* 4.

18. A clergyman shall be amerced only according to his lay tenement, and not after the quantity of his spiritual benefice. *Mag. Chart. c. 14. Gibf.* 15.

19. Distresses shall not be taken by sheriffs, or other of the king's ministers, in the inheritance of the church wherewith it was anciently endowed; but otherwise it is of late purchase. 9 *Ed. 2. c. 9. 2 Inst.* 4. *Gibf.* 18.

20. A clergyman is not bound to pay tolls or other like customs, for his ecclesiastical goods; and if he be molested therefore, he may have a writ for his discharge. 2 *Inst.* 4. *Gibf.* 21.

And this not only for all the goods and merchandizes of clergymen gotten upon their church livings, but also for all goods and merchandizes by them bought, to be spent upon their rectories and church livings. *Degge* 153.

21. Lord Coke, in his readings on the *Magna Charta*, says thus; " True it is, that ecclesiastical persons have more and greater liberties than other of the king's subjects, wherein to set down all would take up a whole volume of itself, and to set down no example agreeth not with the office of an expositor; therefore some few examples shall be expressed, and the studious reader left to observe the rest as he shall read them in our books, and other authorities of law." And the instances he gives, are chiefly those which are mentioned above; nevertheless I do not find any author since his time, who hath said what are those other many and great privileges of the clergy; but the authors do generally adhere to these particular instances, probably as being supported by so great an authority: Other privileges have been

been abolished, since his time, by acts of parliament, and the adjudications of the temporal courts; and others perhaps lost by disuse; and possibly some of the instances abovementioned would have been gone likewise, or not looked upon as of so much authority, if they had not been vouched by lord *Coke*.

II. Benefit of clergy.

I. Original of the benefit of clergy.

II. By what persons it may be demanded.

III. In what cases it may be demanded.

IV. At what time it must be demanded.

V. Effect of clergy allowed.

I. Original of the benefit of clergy.

ANciently princes and states, converted to christianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions; and particularly, an exemption of their persons from criminal proceedings, in some capital cases before secular judges; which was the true original of the benefit of clergy.

Original of the benefit of clergy.

The clergy increasing in wealth, power, honour, number, and interest, afterwards set up for themselves; and that which they obtained by the favour of princes and states at first, they now began to claim as their right, and a right of the highest nature, namely, by the law of god; and by their canons and constitutions endeavoured, and in some places obtained, vast extensions of these exemptions both with regard to the persons concerned, to wit, not only to persons in holy orders, but also to all that had any kind of subordinate ministration relative to the church; and likewise in respect of the causes, exempting as far as they could all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from Christ, and from the pope spread abroad into all subordinate and ecclesiastical jurisdictions.

And by this means they undid what, and in some kingdoms and for three ages following, had been done

double supreme power in every kingdom; the one ecclesiastical, absolute, and independent upon any but the pope, over ecclesiastical men and causes; and the other secular, of the king, or civil magistrate.

But this claim of exemption, altho' it obtained much in this kingdom, yet grew so burdensome, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom: for ecclesiastical canons never bound in *England*, farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted.

And therefore if they were indicted in cases criminal, but not capital, nor wherein they were to lose life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of trespass or petit larceny.

Also it was not allowed them in high treason.

But, at the common law, in all cases of felony or petit treason, clergy was allowable, excepting two, *insidiatores viarum, & arson*. 2 H. H. 323—330.

Who may demand it.

Others besides clergymen.

Women.

Hereticks, Jews, Turks, persons excommunicate.

II. By what persons it may be demanded.

1. By a favourable interpretation of the statutes relating to the benefit of clergy, not only those actually admitted into some inferior order of the clergy, but also those who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verse) have been taken to have a right to this privilege, as much as persons in holy orders. 2 *Haw.* 338.

2. But by the common law, a woman could not have the benefit of clergy: but now by the statute of 3 *W. c. 9.* a woman convicted or outlawed for any felony, for which a man might have his clergy, shall upon praying the benefit of that statute, be subject only to such punishment as a man would be in the like case.

3. Lord *Hale* says, A person convicted of heresy, a Jew, or a Turk, shall not have their clergy; but a person excommunicate shall have his clergy. 2 *H. H.* 373:

But by the 5 *An. c. 6.* which abolished the ceremony of reading, the wall of partition (as Sir *Michael Foster* expresses it) between subject and subject under one and the same degree of guilt, is taken away; which measure in-

titled to the indulgence of the law, in common with the rest of their fellow subjects, all those who before were supposed to be under a legal incapacity for orders, as Jews and some others were, and likewise those who in presumption of law were not qualified in point of learning, of which reading a scrap of latin (*viz. miserere mei deus*) which they called the *neck-verse* was commonly made the test. And from this period, the measure of punishment hath been governed by the degrees of real guilt, and not by the function or abilities of the offender. *Foßl.* 305, 6.

4. By the 4 *H. 7. c. 13.* Every person (not being Persons having had clergy once. within orders) who hath been once admitted to his clergy, shall not be admitted to the same a second time.

5. And if he is convicted of murder, he shall be marked Burning in the hand. (unless he is a peer, 2 *H. H.* 376) with an M, on the brawn of the left thumb; and if for any other felony, with a T. 4 *H. 7. c. 13.*

6. But he shall not be ousted of his clergy, by the bare mark in his hand, or by a parol averment, without the Burning not a conclusive proof of the conviction. record testifying it, or a transcript thereof (according to the following statutes). 2 *H. H.* 373.

And therefore the burning in the hand seemeth now to be of little use, and (as Sir *Michael Foster* observes) can scarcely be called even so much as a slight punishment; but rather a piece of absurd pageantry, tending neither to the reformation of the offender, nor for example to others; to wit, burning the offender in the hand with an iron scarcely heated. *Foßl.* 372.

7. By 34 & 35 *H. 8. c. 14.* 'The clerk of the crown, or of the peace, or of assize, shall certify a transcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the king's bench in 40 days: And the clerk of the crown, when the judges of assize, or justices of the peace write to him for the names of such persons, shall certify the same with the causes of the conviction or attainder. Conviction how to be certified.

8. Another method is given by the 3 *IV. c. 9.* which enacts, that the clerk of the crown, clerk of the peace, or clerk of assize, where a person admitted to clergy shall be convicted, shall at the request of the prosecutor, or any other on the king's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of clergy, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence. *f. 7.* How it may be otherwise certified.

How tried whether he is the same person:

9. Also it seems, that if the party deny that he is the same person, issue must be joined upon it, and it must be found upon trial that he is the same person, before he can be ousted of clergy. 2 H. H. 373.

III. In what cases it may be demanded.

Formerly allowed in all felonies.

1. By the 25 Ed. 3. *ft.* 3. *c.* 4. All manner of clerks, who shall be convicted before the secular judges, for any treasons or felonies, touching other persons than the king himself, shall have the privilege of the holy church.

But not in treason or petit larceny.

2. Clergy was never allowed in this nation in cases of high treason, nor is it allowed on indictments of petit larceny or trespass; but by the above recited act, clergy was allowed in all treasons and felonies, except treason against the king: So that after this statute the benefit of clergy might be pleaded and allowed in all other treasons and felonies. *Hale's Pl.* 230. 2 H. H. 326.

Clergy taken away by statutes.

3. Consequently, wherever clergy is not allowable in any other cases, it is taken away by some subsequent act of parliament. *Hale's Pl.* 230.

Allowed in new felonies, unless expressly taken away.

4. Consequently, where a new felony is made by an act of parliament, clergy is to be allowed, unless expressly taken away by such statute. *Hale's Pl.* 230.

And if it maketh a new felony, and takes away clergy not generally, but in such or such cases, regularly in other cases, clergy is allowable; as if it take away clergy in case the party be convicted by verdict, yet he shall have his clergy, if he stand mute. 2 H. H. 335.

But this is in part remedied by the 3 W. *c.* 9. which enacts, that if any person be *indicted* of any offence, for which by virtue of any former statute he is excluded from clergy, if he had been convicted by verdict or confession; if he stand mute, or will not answer directly, or challenge peremptorily above 20 of the jury, or be outlawed, he shall not be admitted to his clergy. *f.* 2. But this extends not to *appeals*, nor to offences made felonies by subsequent statutes. 2 *Haw.* 348.

But if the statute enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit of clergy, this excludes it in all circumstances, and to all intents. 2 H. H. 335.

Therefore where clergy is excluded, the indictment must bring the offence within the statute.

5. It follows further from what hath been said, that in all cases where an act of parliament ousteth clergy, in case of any felony, the indictment must precisely bring the party within the case of the statute; otherwise, altho' possibly the fact itself be within the statute, and it may

so appear upon the evidence, yet if it be not so alledged in the indictment, the party, tho' convict, shall have his clergy. 2 H. H. 336.

But altho' the case be so laid in the indictment, that it comes within the statute, to exempt the prisoner from clergy, yet if upon the evidence it fall out, that tho' it be a felony, yet it is not so qualified as laid in the indictment, the jury ought to find him guilty of the felony simply, but not as to the matter laid in the indictment, and thereupon the prisoner shall be admitted to his clergy; and this is commonly done. 2 H. H. 366.

6. But if the offence was capital at the common law, and a statute only excludes it from clergy; the indictment in such case need not conclude *against the form of the statute*, because the statute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a personal privilege of exemption from such judgment. 2 Haw. 342.

Indictment on a statute which ousteth of clergy an offence which was felony at common law.

7. Furthermore, from what hath been observed above, it follows, that where an act taketh away clergy from the principal, and saith nothing of the accessory; the accessories as well before, as after, shall have their clergy. 11 Co. 37. *Foist.* 355.

Accessory.

IV. At what time it must be demanded.

1. By the ancient common law, the benefit of clergy was demanded as soon as the prisoner was brought to the bar, before any indictment or other proceeding against him; but this was found a great inconvenience to the prisoner, because possibly he might have been acquitted of the felony; or if not, yet in case of an inquest of office, he lost his challenges to such inquest, and yet upon such inquest found, he forfeited his goods, and the profits of his lands; and therefore *Prisest* Ch. J. with the advice of the other judges, in the reign of H. 6. for the safety of the innocent, would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof: which course hath been generally observed ever since. 2 *Inst.* 164. 2 H. H. 378.

To be demanded after conviction.

2. And this benefit of clergy may be allowed by the court in discretion, tho' the party challenge it not. *Hall's Pl.* 239.

May be allowed tho' not demanded.

V. Effect of clergy allowed.

- Persons having their clergy may be continued in gaol. 1. Persons admitted to their clergy, may be continued in prison as a further punishment, not exceeding one year. 18 *El. c. 7.*
- May be transported. 2. And by 4 *G. c. 11.* Persons convicted of offences within benefit of clergy (except receivers and buyers of stolen goods) may, instead of being whipped and burnt in the hand, be transported for seven years.
- Shall forfeit their goods. 3. A person admitted to his clergy, forfeits all his goods that he hath at the time of the conviction. 2 *H. H. 388.*
- But not lands. 4. But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. 2 *H. H. 388.*
- Credit restored. 5. Also, it restores him to his credit; and consequently enables him to be a good witness. 2 *Haw. 364.*
- Actionable to call him felon. 6. And it is holden that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *Haw. 365.*

Clerk of the peace.

- Who shall appoint. 1. **T**HE *custos rotulorum* shall appoint an able and sufficient person, residing in the county or division, to execute the office of clerk of the peace, by himself or his sufficient deputy (to be allowed of by the said *custos rotulorum*, 37 *H. 8. c. 1.*); and to take and receive the fees, profits, and perquisites thereof, for so long time only as such clerk of the peace shall well demean himself in his said office. 1 *W. c. 21. f. 5.*
- Office not to be sold. 2. But the *custos rotulorum* shall not sell the place of clerk of the peace, or take any bond or other assurance, to receive any reward, fee, or profit, directly or indirectly, to him or to any other person for such appointment; on pain that such *custos rotulorum* selling, and such clerk of the peace buying, shall be disabled to hold their respective places, and shall each forfeit double value of the thing given, to him who shall sue. 1 *W. c. 21. f. 8.*

3. And

3. And every clerk of the peace, before he enters upon Oath, the execution of his office, shall in open sessions take the oath following:

“ I *A. B.* do swear, that I have not, nor will pay any
 “ sum or sums of money, or other reward whatsoever,
 “ nor given any bond or other assurance to pay any mo-
 “ ney, fee, or profit, directly or indirectly, to any per-
 “ son or persons whomsoever, for such nomination and
 “ appointment: So help me god.” *1 W. c. 21. f. 8.*

4. He shall moreover take the oaths of allegiance, su- Qualifying,
 premacy, and abjuration, and perform the other requi-
 sites, as other persons who qualify for offices.

5. No clerk of the peace or his deputy, shall act as so- Not to act as
 licitor, attorney, or agent, or sue out any process at any solicitor.
 general or quarter sessions, where he shall execute the office
 of clerk of the peace or deputy; on pain of 50 l. to him
 who shall sue in 12 months, with treble costs. *22 G. 2.*
c. 46. f. 14.

6. The clerk of the peace shall certify into the king's Shall certify out-
 bench, the names of such as be outlawed, attainted, or lawies.
 convicted of felony. *34 & 35 H. 8. c. 14.*

7. He shall deliver to the sheriff, within ten days after Shall deliver
Sep. 29. yearly, a perfect estreat or schedule of all fines, estreats to the
 and other forfeitures in sessions. *22 & 23 C. 2. c. 22.*
f. 7. sheriff.

8. And shall also yearly, on or before the second *Mar-* Shall deliver
day after the morrow of all souls, deliver into the court estreats into the
 of exchequer a perfect duplicate, certificate, and estreat exchequer.
 of all such estreats and schedules delivered to the sheriffs;
 on pain of 50 l. half to the king, and half to him that
 shall sue. *22 & 23 C. 2. c. 22. f. 8.* And moreover he
 may be amerced for the same, by the barons of the ex-
 chequer. *3 G. c. 15.*

9. And he shall, upon delivery of the said estreats into Upon oath;
 the court of exchequer, take the following oath, to be
 administered by one of the barons;

“ You shall swear, that these estreats, now by you de-
 “ livered, are truly and carefully made up and examined,
 “ and that all fines, issues, amerciaments, recognizance,
 “ and forfeitures, which were set, lost, imposed, or for-
 “ feited, and in right and due course of law ought to be
 “ estreated in the court of exchequer, are, to the best of
 “ your knowledge and understanding, therein contained;
 “ and that in the same estreats are also contained and ex-
 “ pressed, all such fines as have been paid into the court,
 “ from

“ from which the said estreats are made, without any wilful or fraudulent discharge, omission, misnomer, or defect whatsoever.” 4 & 5 W. c. 24. s. 5.

Penalty of concealing fines.

10. And if he shall spare, take off, discharge, or conceal any such fine or forfeiture, unless it be by rule of court, he shall forfeit treble value, half to the king, and half to him that shall sue; and shall also forfeit his office, and be incapable to be employed in any office where the revenue is concerned. 22 & 23 C. 2. c. 22. s. 9.

Fees.

11. The clerk of the peace is not bound to enter judgment, or the like, at the suit of any, without having the fee due for the same; but if the court order any thing without suit of another, to wit, *ex officio*, there he ought to enter the same without having any fee for the entering thereof. *Crom.* 159.

Also Mr. *Crompton* says, he shall have for every recognizance of the peace taken in court 2s. and for every release of the peace there 2s. and for process awarded against any to find surety of the peace 2s. *Crom.* 160.

And by 10 & 11 W. c. 23. he shall have only 2s. for drawing an indictment of felony; and if it is defective he shall draw a new one *gratis*, on pain of 5 l. with full costs, to him that shall sue. s. 7, 8.

His fees also in divers other cases are specially limited by act of parliament; and it seemeth to be one of the *de-fiderata* in the justices law, that the clerk of the peace his fees are not ascertained in all instances, even as those of the other clerks to justices of the peace by the statute of the 26 C. 2. c. 14. And withal it might be requisite to insert in the table to be agreed on for that purpose, by whom the same shall be paid in the several instances respectively, and what shall be the course of recovering the same on nonpayment.

May be displaced for misbehaviour.

12. If any clerk of the peace shall misdemean himself in the execution of his office, and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him, to the justices in sessions, the said justices may, on examination and due proof thereof openly in the said sessions, suspend or discharge him from the said office; and in such case, the *custos rotularum* shall appoint another able and sufficient person, residing in the said county or division, to be clerk of the peace. And in case of refusal or neglect to make such appointment, before the next general quarter sessions, the justices in sessions may appoint one. 1 W. c. 21. s. 6.

His duty in other matters is interspersed where it falls in amongst the other titles of this book.

Appointment

Appointment of a clerk of the peace; on the 37 H. 8.
c. 1. and 1 W. c. 21.

FOrasmuch as the office of clerk of the peace for the county of——— is now void, by the death of———gentleman, late clerk of the peace for the said county; Know all men by these presents, that I———custos rotulorum of the county aforesaid, do hereby nominate, elect, appoint and assign C. P. gentleman, an able and sufficient person, instructed and learned in the laws of England, and residing in the said county, to be clerk of the peace for the said county; to hold, execute, and enjoy the office of clerk of the peace for the county aforesaid by himself or his sufficient deputy; and to take and receive the fees, profits and perquisites thereof, so long as he shall well, justly, and honestly demean himself in his said office. In witness whereof I the said———have hereunto set my hand and seal, the——day of———in the——year——.

Clipping money. See **Coin**.

Clockmaking. See **Servants**.

Cloth and Clothiers. See **Woollen Manufactures**.

Coaches and chairs. See **Carriage and Hackney coaches**.

Coals and coalpits.

1. **B**Y the 10 G. 2. c. 32. If any person shall wilfully Setting on fire. and maliciously set on fire any mine, pit or delph of coal or cannel coal; he shall be guilty of felony without benefit of clergy.

2. And by 13 G. 2. c. 21. If any person shall divert or Drowning. convey any water into any coal work, with design to destroy or damage the same; he shall pay to the party grieved treble damages with costs.

3. There are many regulations by several statutes, concerning the weights, measures, and prices of coals, especially in and about *London*, and also concerning the duties thereupon, which not being of general concern, I shall but just mention the statutes, referring thereunto those who are more particularly concerned. Measure, price and duty on coals.

Statutes concerning the measures and prices of coals, and regulating the coal trade in general, are,

9 <i>H.</i> 5. c. 10.	3 <i>G.</i> 2. c. 26.
16 & 17 <i>C.</i> 2. c. 2.	4 <i>G.</i> 2. c. 30.
30 <i>C.</i> 2. c. 8.	11 <i>G.</i> 2. c. 15.
6 & 7 <i>W.</i> c. 10.	17 <i>G.</i> 2. c. 35.
9 <i>Ann.</i> c. 28.	19 <i>G.</i> 2. c. 35.
12 <i>An. ft.</i> 2. c. 27.	23 <i>G.</i> 2. c. 26.

Statutes concerning the duties on coals;

1 <i>J.</i> 2. c. 15.	9 <i>An.</i> c. 23. <i>f.</i> 90.
6 & 7 <i>W.</i> c. 18.	12 <i>An. ft.</i> 2. c. 9.
9 & 10 <i>W.</i> c. 13.	1 <i>G. ft.</i> 2. c. 23.
10 & 11 <i>W.</i> c. 21.	5 <i>G.</i> c. 9.
8 <i>An.</i> c. 4.	22 <i>G.</i> 2. c. 37.
9 <i>An.</i> c. 6.	

Cocoa nuts. See **Excise**.

Coffee. See **Excise**.

Coin.

For matters common to this with other treasons, see title **Treason**.

Original of the word.

1. **COIN**, in French, signifieth a corner, and from thence hath its name (according to Lord *Coke*) because in ancient time money was square with corners, as it is in some countries at this day. 1 *Inst.* 207.

Others derive this word, which in the old *French* is written *coign*; as also the Italian *cunio*, and the Spanish *cuno*, from the Greek word κοινός, *communis*; because money is the common mean or instrument of traffick.

But these derivations are too artificial. The word doth properly signify a wedge, as the Latin *cuneus*; and hath a verb belonging to it in the several languages: and is translated to lawful money; either from the form of a wedge, ingot, or lingot (*linguetta*) in which bullion was transported from all antiquity; or else from the instrument, a wedge or chissel, with which in trade, these lingots were occasionally

tionally cut to the weight required, as they are at this day in the East Indies, with sheers.

2. The legitimization of money, and the giving it its Value of coin. denominated value, is one special part of the king's prerogative. 1 *H. H.* 188.

3. And the king may by his proclamation legitimate Legitimizing foreign coin. foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation. 1 *H. H.* 192.

And therefore both *English* money, coined by the king's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England*. 1 *Inst.* 207.

4. But only gold or silver coin, and not brass or copper, Copper coin. are within this denomination. 1 *Haw.* 42.

And no person can be enforced to take in payment any money but of lawful metal, that is of silver or gold. 2 *Inst.* 577. Except for sums under six pence. 1 *H. H.* 195.

5. By the statute of 25 *Ed. 3. ft. 5. c. 2.* it is made Counterfeiting the coin of this realm. treason to counterfeit the coin of this realm: That is to say, whether the person utter it or not. 3 *Inst.* 16. 1 *Haw.* 42.

6. And if any person shall falsely forge and counterfeit Counterfeiting foreign current coin. any such kind of coin of gold or silver, as is not the proper coin of this realm, and shall be current therein by the king's consent; he, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. 1 *Marr. sess.* 2. c. 6.

7. By the 5 *El. c. 11.* Clipping, washing, rounding, Clipping, washing, filing. or filing, for lucre or gain, any the proper coin of this realm, or the dominions thereof, or of any other realm current within this realm by proclamation, shall be adjudged treason in the offenders, their counsellors, consenters and aiders.

8. And by the 18 *El. c. 1.* If any person shall, for lucre or gain, by any art, ways, or means, impair, diminish, falsify, scale, or lighten the proper coin of this realm, or any the dominions thereof, or the coin of this realm, allowed to be current at the time of the offence committed, by the king's proclamation; he, his counsellors, consenters, and aiders shall be guilty of treason. Impairing, diminishing, falsifying.

9. And if any person (not employed in the mint) shall Edging. mark on the edges any the current coin of this kingdom; or, if any person whatsoever shall mark on the edges any of the diminished coin of this kingdom, or any counterfeit coin resembling the coin of this kingdom, with letters or

grainings, or other marks or figures like unto those on the edges of money coined in the mint; he, his counsellors, procurers, aiders, and abettors shall be guilty of high treason. 8 & 9 *W. c.* 26. *f.* 3. Prosecution to be in six months. 1 *An. st.* 1. *c.* 9.

Colouring.

10. Also, if any person shall colour, gild, or case over with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling any the current coin of this kingdom, or any round blanks of base metal, or of course gold or course silver, of a fit size and figure to be coined into counterfeit milled money, resembling any the gold or silver coin of this kingdom; or if any person shall gild over any silver blanks of a fit size and figure to be coined into pieces resembling the current gold coin of this kingdom; he, his counsellors, procurers, aiders, and abettors shall be guilty of high treason. 8 & 9 *W. c.* 26. *f.* 4. Prosecution to be in three months. *f.* 9.

And by the 15 & 16 *G. 2. c.* 28. If any person shall wash, gild, or colour any lawful or counterfeit silver coin called a shilling or sixpence, or add to or alter the impression, or any part thereof, on either side, with intent to make such shilling or sixpence resemble a guinea or half guinea; or shall any way alter or colour halfpennies or farthings, with intent to make them resemble a shilling or sixpence; he, his counsellors, aiders, and abettors shall be guilty of high treason. Prosecution to be in six months.

**Counterfeiting
halfpence and
farthings.**

11. Lord *Hale*, speaking of copper halfpence and farthings, makes it a query, whether the counterfeiting of them be not treason within the statute of 25 *Ed.* 3. but inclines to the negative. 1 *H. H.* 195, 211, 212.

And with this agrees the sense of the legislature, in the statute of 15 & 16 *G. 2. c.* 28. which reciting that whereas the counterfeiting of the copper coin of this kingdom is only a misdemeanor, and the punishment often very small, therefore enacteth, that if any person shall coin or counterfeit brass or copper halfpence or farthings; he, his counsellors, aiders, and abettors, shall suffer two years imprisonment, and find sureties for their good behaviour for two years more. *f.* 6.

Nevertheless, experience assureth that this penalty is still far too small; for since the making of this act, counterfeit halfpence have abounded even more than they did before, to the great injury of trade, and vexation of the people: insomuch that I have known in a common country church a dozen or fourteen bad halfpence, good for nothing, collected upon a common charity brief; which, at the same
rate

rate throughout the kingdom, is 250l. loss to the petitioners. Nay even the act itself may possibly have tended to defeat its own good design; for hereby the offenders are assured (which before was in some sort doubtful to them) that the crime is not treason nor felony.

12. If any person shall falsly forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, nor permitted to be current within this realm; he, his procurers, aiders, and abettors shall be guilty of misprision of high treason. 14 *El. c. 3.* Counterfeiting
coin not current.

13. If any person shall bring false money into the realm, counterfeit to the money of *England*, knowing the same to be false, to merchandise or make payment, in deceit of the king and his people; he shall be guilty of high treason. Bringing in false
money. 25 *Ed. 3. st. 5. c. 2.*

Also, if any person shall bring from the parts beyond the sea, any forged and counterfeit money like to the gold or silver coin of foreign realms, current in payment within this realm by the king's sufferance and consent, knowing the same to be false and counterfeit, to the intent to utter or make payment of the same within this realm, by merchandizing or otherwise; he, his counsellors, procurers, aiders, and abettors shall be guilty of high treason. 1 & 2 *P. & M. c. 11. s. 2.*

Note; This must be brought from a foreign nation, and not from *Ireland*, or other place subject to the crown of *England*; because the counterfeiting there, is punishable by the laws of our king, as much as in *England*. 1 *Haw. 43.*

Sir *Michael Foster* observing upon these offences (and of the offence abovementioned, of counterfeiting foreign current coin) says, prosecutions for importing money counterfeit to the similitude of *English* coin have been very rare; and for the offences of counterfeiting foreign coin legitimated by proclamation, and of importing such coin, there can be none, as things stand at present, till the crown shall be advised to legitimate some species of foreign coin. I know of none (says he) now current among us that is legitimated, and most probably none will. For if the offences of counterfeiting and diminishing foreign coin, and of importing such counterfeit and diminished coin, which are great evils and daily growing, were made more penal than they are at present, he says he knows of no good end that could be answered by legitimating any species of it; on the other hand, there seem to be great inconveniences that would attend it. *Pg. 227.*

Coining prefs
and tools.

14. If any prefs for coinage, shall be found in the custody of any person (other than the officers of the mint), it shall be seized for the king's use; and every person in whose custody such prefs shall be found, shall forfeit 500 l. half to the king, and half to the informer. 7 & 8 *W. c.* 19. *f.* 4.

And by 8 & 9 *W. c.* 26. No person, unless employed in the mint, shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any puncheon, counter-puncheon, matrix, stamp, dye, pattern or mould, of steel, iron, silver, or other metal, or of spaud, or fine founders earth, or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, or resemblance of both or either of the sides or flats of any gold or silver coin, current within this kingdom; nor shall knowingly make or amend, or begin or proceed to make or amend, or assist in the making or mending of any edger or edging tool, instrument, or engine, not of common use in any trade, but contrived for making of money round the edges with letters, grainings, or other marks or figures resembling those on the edges of money coined in the mint; nor any prefs for coinage; nor any cutting engine for cutting round blanks by force of a screw, out of flatted bars of gold, silver, or other metal; nor shall knowingly buy or sell, hide or conceal, or without lawful authority or sufficient excuse for that purpose, knowingly have in his house custody, or possession, any such puncheon, counter-puncheon, matrix, stamp, dye, edger, cutting engine, or other tool or instrument before mentioned; on pain that such person, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. *f.* 1. Prosecution to be in three months. *f.* 9. But by the 1 *An. st.* 1. *c.* 9. *f.* 2. The prosecution for offences by making or mending, or beginning or proceeding to make or mend any coining tool or instrument in the above said act prohibited, or by marking of money round the edges with letters or grainings, may be commenced at any time within six months.

And if any person shall, without lawful authority, knowingly convey, or assist in conveying out of the mint, any puncheon, counter-puncheon, matrix, dye, stamp, edger, prefs or other tool, engine, or instrument used for or about the coining of monies there, or any useful part of such tool or instrument; he, his counsellors, procurers, aiders, or abettors, shall be guilty of high treason. 8 & 9 *W. c.* 26. *f.* 2. Prosecution to be in three months. *f.* 9.

And if any puncheon, dye, stamp, edger, cutting engine, press, flask, or other tool, instrument, or engine, used or designed for coining or counterfeiting gold or silver monies, or any part of such tool or engine, shall be hid or concealed in any place, or found in the house, custody, or possession of any person not employed in the mint, nor having the same by some lawful authority; any person whatsoever discovering the same, may and shall seize the same, and carry them forthwith to some justice of the peace to be by him secured, to be produced in evidence, against any person who shall be prosecuted for any such offence. And after they have been produced in evidence, they shall forthwith by order of the court (or by order and in the presence of a justice of the peace, if there hath been no trial) be totally defaced and destroyed. 8 & 9 *W. c.* 26. *f.* 5.

15. For the better preventing the clipping, diminishing, ^{Selling of clip-} or impairing the current coin, if any person shall buy or ^{pings.} sell, or knowingly have in his custody or possession, any clippings or filings of the current coin of this kingdom; he shall forfeit the same, and also 500 l. half to the king, and half to the informer; and shall be branded in the right cheek with the letter R; and be imprisoned till the payment of the 500 l. 6 & 7 *W. c.* 17. *f.* 4.

16. And if any shall cast ingots or bars of silver, in ^{Bullion.} imitation of *Spanish* bars or ingots, or stamp them in likeness of the *Spanish* stamp, he shall forfeit the same, and also 500 l. half to the king, and half to the informer. 6 & 7 *W. c.* 17. *f.* 2.

And if any broker, not being a trading goldsmith or refiner of silver, shall buy or sell any bullion or molten silver, he shall be imprisoned six months. *f.* 7.

And two justices may search (and with the help of a constable may break open houses, trunks, or boxes, to search) for bullion suspected to be concealed; and if found, they shall seize the same, and the person in whose possession it shall be found; and if such person shall not prove by the oath of himself, or of a credible witness, that it is lawful silver, and was not current coin, nor clippings thereof, he shall be committed; and if on his trial he shall not prove the same by one witness, he shall be imprisoned six months. *f.* 8.

And no person shall ship any molten silver or bullion, without certificate from the court of the lord mayor and aldermen of *London*, and oath made before them by the owner and two witnesses, that it is foreign bullion, and that no part of it was the coin of this realm, or clippings thereof,

nor

nor plate wrought within this kingdom; on pain of forfeiting the same, half to the king, and half to him who shall sue. And the master or captain of a ship permitting the same, shall forfeit 200 l. to him who shall sue; and if it is a king's ship, he shall also forfeit his employment. Also any officer of the customs offending herein, shall forfeit 200 l. and his office. And in case of seizure of such bullion, or action brought for the forfeitures, the proof shall lie upon the owner; and for want of proof it shall be forfeited. 7 & 8 W. c. 19. f. 8, 9.

And if any bullion is entered to be exported, other than in the name of the true owner, it shall be forfeited, half to the king, and half to him who shall seize or discover the same. 6 & 7 W. c. 17. f. 14.

Blanched copper,
and other base
metal.

17. And whereas several mixtures of metals have been invented in imitation of gold and silver, and blanch copper is principally made use of in imitation of silver, and seldom, if ever, for any honest or good purpose, it is enacted, that if any person shall blanch copper for sale, or mix blanch copper with silver, or knowingly buy or sell or offer to sale blanch copper alone, or mixed with silver; or shall knowingly and fraudulently buy or sell or offer to sale any malleable composition or mixture of metals or minerals, which shall be heavier than silver, and look, and touch, and wear like standard gold, but be manifestly worse than standard; he shall be guilty of felony, and shall suffer death as in case of felony. Prosecution to be in three months. 8 & 9 W. c. 26. f. 6, 9.

Paying coin un-
der value.

18. If any person shall take, receive, pay, or put off any counterfeit milled money, or any milled money whatsoever unlawfully diminished, and not cut in pieces, at or for a lower rate or value, than the same by its denomination doth or shall import, or was coined or counterfeited for; he shall be guilty of felony, and suffer death as in case of felony. Prosecution to be in three months. 8 & 9 W. c. 26. f. 6, 9.

Uttering false
money.

19. If one person counterfeits, and by agreement before the counterfeiting, another person is to take off and vent the counterfeit money, such other is an aider and abettor, and consequently a principal traitor (for in high treason there are no accessaries.) 1 H. H. 214.

If one person counterfeit, and another (knowing that he did so) puts it off, but without any such previous agreement; such other person seems to be all one with a receiver of him, because he maintains him. 1 H. H. 214.

If one person counterfeit, and another person know that he did so, and doth neither receive, maintain, or abet him,
but

but conceals his knowledge; this is misprision of treason.
1 H. H. 214.

But, formerly, where it did appear, that the utterer of counterfeit money knew who counterfeited it, but barely uttered it for his own benefit, altho' he knew it was counterfeit, yet it was only a cheat and misdemeanor, punishable by fine and imprisonment (contrary to the opinion in *Stamford* and *Dalton*); but now by the statute of 15 G. 2. c. 28. it is enacted, that whereas the uttering false money is a crime frequently committed all over the kingdom, and the offenders are not deterred, because it is only a misdemeanor, and the punishment generally small, tho' there is reason to believe that the utterers are often the coiners, or in confederacy with them; therefore, if any person shall tender in payment any counterfeit coin, knowing it to be so, he shall for the first offence suffer six months imprisonment, and find sureties for his good behaviour for six months longer; for the second offence, shall suffer two years imprisonment, and find sureties for two years more; and for the third offence, shall be guilty of felony without benefit of clergy. §. 2.

And if any person shall tender in payment any counterfeit money (knowing it to be so), and shall either the same day, or within ten days after, knowingly tender other false money in payment, or at the time of such tendering have more in his custody; he shall for the first offence suffer a year's imprisonment, and find sureties for his good behaviour for two years more; and for the second offence, shall be guilty of felony without benefit of clergy. §. 3.

Persons guilty of the said crimes shall be tried and convicted in such manner as is used against offenders for counterfeiting the coin: and the clerk of assize, or clerk of the peace, where the first conviction was had, shall certify the same by a transcript in few words, containing the tenor of such conviction (for which he shall have 2s. 6d.); and such certificate being produced in court, shall be sufficient proof of the former conviction. Prosecution to be in six months. §. 5, 9.

Note; By this it should seem, that the justices of the peace in sessions have power to try such offenders; otherwise this direction to the clerk of the peace to certify the conviction is impertinent; for he is not the proper person to certify what is done in another court, where he is not necessarily supposed to be present: albeit no power is given to the sessions by any express words in this statute to hear and determine such offences.

Having false money in possession.

20. If false or clipt money be found in a man's hands; if he be suspicious, he may be arrested till he have found his warrant. 3 *Inst.* 18. *Hale's Pl.* 21. 1 *Haw.* 43.

False money what to be done with.

21. Any person to whom any silver money shall be tendered, any piece whereof shall be diminished, otherwise than by reasonable wearing, or that by the stamp, impression, colour, or weight thereof, he shall suspect to be counterfeit, may cut, break, or deface such piece: and if any piece so cut, broken, or defaced shall appear to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and appear to be lawful money, the person that cut, broke, or defaced the same, shall receive the same at the rate it was coined for. And if any question arise, whether the piece so cut be counterfeit, it shall be determined by the next justice of the peace, or chief magistrate in a corporation. 9 & 10 *W. c.* 21. *f.* 1.

And if any counterfeit or unlawfully diminished money shall be produced in any court of justice, either in evidence or otherwise, the judge shall cause it to be cut in pieces in open court, or in the presence of a justice of the peace, and then to be delivered to or for the person to whom it belongs. 8 & 9 *W. c.* 26. *f.* 5.

Bar: 22. By the 3 *Ed.* 1. *c.* 15. Persons taken for false money are not bailable by justices of the peace.

But they must take the examinations and informations, and bind over the witnesses to the proper court, and commit the persons accused. 1 *H. H.* 372.

Evidence. 23. It is not necessary there should be two witnesses in cases of counterfeiting the coin, as it is in other high treasons; but persons may be convicted according to the course of the common law, by one witness only. 1 *H. H.* 318, 328.

Judgment. 24. The judgment for high treason, relating to the coin, is, to be drawn to the place of execution, and there hanged by the neck till he be dead. 2 *Haw.* 444.

But it is generally provided by the several statutes, that this shall work no corruption of blood, nor loss of dower.

Excepted out of the general pardon.

25. The above-said offences relating to the coin, are excepted out of the general pardon, of the 20 *G.* 2. *c.* 52.

Reward for convicting an offender.

26. Every person who shall apprehend any person who hath counterfeited any of the current [gold or silver] coin of this realm; or that for lucre or gain hath clipped, washed, filed, or any way diminished the same; or hath altered shillings and sixpences to make them resemble guineas and half guineas, or halfpennies and farthings to make

make them look like shillings and sixpences; or shall bring or cause to be brought into this kingdom, any clipt, false, or counterfeit coin; and prosecute such person to conviction: every such person shall have a reward of 40 l. In order to which, the judge shall give him under his hand, a certificate certifying the conviction, and the county in which it was made, and that the offender was taken and prosecuted by such person; and if any dispute shall arise between several persons apprehending and prosecuting, the judge shall in the certificate appoint the reward to be paid amongst them, in such proportion as he shall think reasonable. The said certificate to be tendred to the sheriff, who shall thereupon pay the same without fee, within one month after such tender and demand, on pain of forfeiting to the party double the sum, with treble costs. The sheriff to be repaid out of the treasury. 6 & 7 IV. c. 17. s. 9, 10, 11. 15 & 16 G. 2. c. 28. s. 7.

In like manner a reward of 10 l. shall be paid, for apprehending and convicting a counterfeiter of the copper money. 15 & 16 G. 2. c. 28. s. 7.

27. If any person being out of prison, shall be guilty of clipping, coining, counterfeiting, washing, filing, or otherwise diminishing the [gold or silver] coin of this realm, and afterwards discover two or more persons who have committed any of the said crimes, so as two or more be convicted; he shall have the king's pardon, and if he is an apprentice, he shall be made a freeman. 6 & 7 IV. c. 17. s. 12.

Pardon to accomplices informing.

In this clause at large in the statute, is an instance of that multiplicity of words, which is sometimes ridiculed in our laws; where it is said, *two or more person or persons*, and again, *two or more of the person or persons*.

Further; If any person being out of prison, shall be guilty of altering sixpences or shillings, to make them look like half guineas or guineas; or altering farthings or halfpennies, to make them look like sixpences or shillings; or of counterfeiting brass or copper halfpennies or farthings; or of uttering false money,—and afterwards discover two or more persons who have committed any of the said crimes, so as two be convicted; he shall have the king's pardon. 15 & 16 G. 2. c. 28. s. 8.

28. The commissioners of the treasury may issue a sum not exceeding 600 l. yearly, for the charges and expences of the officers and others employed in the prosecution of offences in counterfeiting, diminishing, or otherwise concerning the current coin of this realm. 7 An. c. 24. s. 4. 15 & 16 G. 2. c. 28. s. 10.

Charges of prosecuting.

Commitment.

Commitment.

Without war-
rant,

Anciently there were more felons committed to gaol without mittimus in writing, than were with it: such were all the commitments by constables, watchmen, and private persons arresting for felony, and bringing to the common gaol, long before there were any justices of the peace; and yet mittimus's are not of so ancient date even as they. 1 *H. H.* 610.

But now, since the *habeas corpus* act, a commitment in writing seems more necessary than it was in former times; otherwise the prisoner may be admitted to bail upon that act, whatsoever his offence may have been.

Commitment,
when,

When a statute appoints imprisonment, but limits no time when, it is to be understood that he shall be imprisoned presently. *Dalt. c.* 170.

Concerning which I will set forth,

I. Who may be committed.

II. To what place.

III. The form of the commitment.

IV. Charges of the commitment.

V. That the gaoler shall receive the prisoner.

VI. Shall certify the commitment.

VII. Commitment discharged.

Who may be
committed.

I. Who may be committed.

Persons not bail-
able, or not
finding bail.

1. There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 *Haw.* 116.

Persons guilty of
contempt.

2. And it is said, that wheresoever a justice is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply. 2 *Haw.* 116.

Persons charged
with felony.

3. If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him. 2 *H. H.* 121.

4. But if he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice may discharge him; as if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which tho' there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony. But if a man be killed by another, tho' it be by misadventure, or self defence (which is not properly felony), or in making an assault upon a minister of justice in execution of his office (which is not at all felony), yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed. 2 *H. H.* 121.

Persons charged
on suspicion.

5. But commitment by the justices of the peace almost in all cases (except for the peace, good behaviour, felony, or higher offences) is but to retain the party till he hath made fine to the king; and therefore if he offer to pay it, or find sureties by recognizance to pay it, he ought not to be committed, but to be delivered presently. *Dalt.* c. 170.

Persons not pay-
ing their fine.

II. To what place.

To what place;

1. By the 5 *H.* 4. c. 10. All felons shall be committed to the common gaol, and not elsewhere. To the gaol.

2. But by the 6 *G.* c. 19. Vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper. House of correction.

3. And they may commit other offenders to the stocks, or other custody, by particular statutes. Stocks.

4. Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to gaol in that county where he is taken. *Dalt.* c. 170. Different county.

Yet if he escapes, and is taken on fresh suit, in another county, he may be carried back to the county where he was first taken. *Dalt.* c. 170.

Also by the 24 *G.* 2. c. 55. If a person is apprehended, upon a warrant indorsed, in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and be committed

mitted (or if bailable, bailed) by the justices in such first county.

Form :

III. Form of the commitment.

In whose name. 1. It must be in writing, either in the name of the king, and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119.

Yet the mention of the name and authority of the justice (lord *Hale* says) in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus, is sufficient warrant to the gaoler; for it may be supplied by averment, that it was done by the justice. 2 *H. H.* 122.

The party's name.

2. It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add that he refuseth to tell his name. 1 *H. H.* 577.

Oath.

3. It is safe, but not necessary, to set forth, that the party is charged upon oath. 2 *Haw.* 120.

Cause.

4. It ought to contain the cause, as for treason, or felony, or suspicion thereof; otherwise if it contain no cause at all, if the prisoner escape it is no offence at all; whereas if the mittimus contained the cause, the escape were treason or felony, tho' he were not guilty of the offence; and therefore for the king's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 *Inst.* 52.

And hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him, is utterly against law. 2 *Inst.* 591.

Also, it ought to contain the certainty of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as for felony *for the death of such an one*, or for burglary *in breaking the house of such an one*; and the reason is, because it may appear to the judges of the king's bench, upon an *habeas corpus*, whether it be felony or not. 2 *H. H.* 122.

But the want hereof seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment; but it lies in averment to excuse the gaoler or officer, that the matter was for felony. 1 *H. H.* 584.

5. It must have an apt conclusion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law. 2 *Haw.* 120. 2 *H. H.* 123. Conclusion.

But if the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplusage, and the rest shall stand; so that if the matter appear to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged, but the wrong conclusion shall be rejected. 1 *H. H.* 584.

It is also to be observed, that a commitment grounded on an act of parliament, ought to be conformable to the method prescribed by it. As where the overseers were committed for refusing to account, and the warrant concluded in the common form, until they be duly discharged according to law, upon the return of an *habeas corpus* the court held the commitment void, because the warrant ought to have concluded, there to remain until he shall account, as the 43 *El. c. 2.* doth appoint. And a difference is, where a man is committed as a criminal, and where only for contumacy; in the first case, the commitment must be, until discharged according to law; but in the latter, until he comply. 2 *Haw. Not.* 38.

Where a statute appoints imprisonment, but limits no time how long, in such case the prisoner must remain at the discretion of the court. *Dalt. c.* 170.

6. It must be under seal; and without this, the commitment is unlawful, the gaoler is liable to false imprisonment, and the wilful escape by the gaoler, or breach of prison by the felon, makes no felony. 1 *H. H.* 583. Seal.

But this must not be intended of a commitment by the sessions, or other court of record; for there the record it self, or the memorial thereof, which may at any time be entred of record, are a sufficient warrant, without any warrant under seal. 1 *H. H.* 584.

7. It should also set forth the place at which it is made (that it may appear to be within the jurisdiction of the justice). 2 *Haw.* 119. Place.

8. It must also have a certain date, of the year and day. 2 *H. H.* 123. Time.

IV. Charges of the commitment.

By the 3 *J. c. 10.* Every person who shall be committed to the common or usual gaol, within any county or liberty, by any justice of the peace, for any offence or misdemeanor,

Commitment.

misdemeanor, the said person so to be committed, having means or ability thereunto, shall bear his own reasonable charges for so conveying or sending him to the said gaol, and the charges also of such as shall be appointed to guard him to such gaol, and shall so guard him thither : And if any such person so to be committed, shall refuse at the time of his commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same ; then such justice shall by writing under his hand and seal, give warrant to the constable of the hundred, or constable of the township where such person shall be dwelling and inhabit, or from whence he shall be committed, or where he shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said person so to be committed, as by the discretion of the said justice shall satisfy and pay the charges of such his conveying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the parish where such goods shall be ; the overplus to be delivered to the party.

And by the statute of the 27 G. 2. c. 3. When any person, not having goods or money in the county where he is taken, sufficient to bear the charges of himself and of those who convey him, is committed to gaol, or to the house of correction, by warrant from a justice, then on application by the constable or other officer who conveyed him, to any justice for such county or place [such justice] shall upon oath examine into and ascertain the reasonable expences, and shall without fee by his warrant order the treasurer to pay the same. But in *Middlesex*, the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

Note ; By the *habeas corpus* act, the charges of conveying an offender is limited not to exceed 12 d. a mile ; which may be an argument for allowing as much in this case, especially as security is to be given before a man is removed on that act by *habeas corpus*, that he shall not escape by the way, which renders guards in that case not so necessary.

V. Gaoler shall receive the prisoner.

Gaoler refusing
to receive.

If the gaoler shall refuse to receive a felon, or take any thing for receiving him, he shall be punished for the same, by the justices of gaol delivery. 4 Ed. 3. c. 10. *Dalt.* c. 170.

But if a man be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he was taken; and that town shall be charged with the keeping of him, until the next gaol delivery: Or the person that arrested him, may in such case keep the prisoner in his own house, as it seemeth. *Dalt. c. 170.*

But in other cases it seems, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol, or there be evident danger of a *rescous* from rebels, or the like. *2 Haw. 118.*

VI. The gaoler shall certify the commitment.

By the 3 *H. 7. c. 3.* The sheriff or gaoler shall certify ^{Commitment to be certified.} the commitments, to the next gaol delivery.

VII. Commitment discharged.

It seems that a person legally committed for a crime, ^{Commitment discharged.} certainly appearing to have been done by some one or other, cannot be lawfully discharged by any one but the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose by the justices of gaol delivery. But if a person be committed on a bare suspicion, without an indictment for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be safely dismissed without any farther proceeding, for that he who suffers him to escape is properly punishable only as an accessory to his supposed offence; and it is impossible that there should be an accessory, where there can be no principal; and it would be hard to punish one for a contempt, in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless. *2 Haw. 121.*

Mittimus for felony.

Westmorland. **S**IR John Pennington, *baronet, one of the justices of our lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county*

Commitment.

county committed; To the keeper of the gaol of our said lord the king at ——— in the said county, or to his deputy there, and to each of them, greeting. Whereas A. O. late of ——— in the said county, labourer, hath been arrested by the constable of ——— in the said county, for suspicion of a felony by him, as it is said, committed, in stealing a black mare, of the value of 40s. the property of A. P. of ——— in the said county, yeoman: Therefore on the behalf of our said lord the king, I command you and each of you, that you or one of you receive the said A. O. into your custody in the said gaol, there to remain till he be delivered from your custody by the law and custom of England. Given under my hand and seal at ——— in the said county, the ——— day of ——— in the ——— year of the reign of our said lord ———.

Another.

Westmorland. **J.** P. esquire, &c. To the keeper of the common gaol at ——— in the said county, or to his deputy there: These are in his majesty's name to charge and command you, that you receive into your said gaol, the body of A. O. late of ——— in the said county, yeoman, taken by A. C. constable of ——— in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing ——— And that you safely keep the said A. O. in your said gaol, until the next general gaol delivery for the said county [if he be not bailable; or if bailable, then thus] until he shall thence be delivered by due course of law. And hereof fail you not, &c.

Another.

Westmorland. **J.** P. esquire, &c. To the keeper of ——— I send you herewithal the body of A. O. late of ——— in the said county, labourer, brought before me this present day, and charged with the felonious taking and carrying away forty sheep, the property of ——— which also he hath confessed upon his examination before me [by which he is not bailable]: Therefore these are on the behalf of our said lord the king to command you, that immediately you receive the said A. O. and him safely keep in your said gaol, until that he be thence delivered by the due order of law. Hereof fail you not, as you will answer for your contempt at your peril. Given under my hand and seal at ——— &c.

Or thus, in the king's name.

Westmorland. **G**EORGE the third by the grace of god, of Great Britain, France, and Ireland, king, defender of the faith, and so forth: To the keeper of our goal at ——— in our said county of W. or to his deputy, greeting: Whereas A. O. late of ——— in our said county, yeoman, is arrested for suspicion of felony, by him, as it is said, committed, in feloniously taking and carrying away ——— of the value of ——— the property of ——— We therefore command you, and each of you, that you receive him the said A. O. into your custody in our said goal, or that one of you do receive him, there to remain till he be delivered from your custody, according to the law of our kingdom of England. Witness J. P. esquire, one of the justices assigned to keep the peace in our said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at ——— in the said county, the ——— day of ——— in the ——— year of our reign.

General Form of a warrant of commitment.

Westmorland. **J**. P. esquire one of the justices of our lord the king, assigned to keep the peace within the said county, To the constable of ——— in the said county, and to the keeper of ——— at ——— in the said county.

These are to command you the said constable, in his Majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said ——— the body of A. O. charged before me with [here insert the offence.] And you the said keeper are hereby required to receive the said A. O. into your custody in the said ——— and him there safely to keep, &c. Given under my hand and seal, the ——— day of ——— in the ——— year of the reign of his said majesty king George the third.

Common. (Nuisance by digging holes therein.)
See Highways.

Common prayer.

1. **I**mpugners of the form of worship in the church of England, established by law, and contained in the book of common prayer.

book of common prayer; of the 39 articles; of the rites and ceremonies of the church; and of episcopal government; shall be excommunicated *ipso facto*, and not restored but by the bishop or archbishop on their repentance. *Can. 5, 6, 7.*

Ministers derogating from the book of common prayer.

2. If any parson, vicar or other minister, that ought to use the common prayer, or to minister the sacraments, shall refuse to do the same, or (wilfully standing in the same) shall use any other form, or shall speak any thing in derogation of the same book or of any thing therein contained; he shall, on conviction, for the first offence forfeit to the king one year's profit of all his spiritual promotions, and be imprisoned for six months; for the second offence, shall be deprived of all his spiritual promotions, and be imprisoned for a year; and for the third offence, shall be deprived of all his spiritual promotions, and be imprisoned during life. And if he has no spiritual promotion, he shall for the first offence be imprisoned for a year; and for the second offence, during life. *1 El. c. 2. f. 4—8.*

But this shall not restrain the spiritual court, from proceeding against these offenders; and they may be deprived by the said court, according to the course of the spiritual law, for the first offence. *id. f. 16, 23. 1 Haw. 9.*

Any person depraving the book of common prayer.

3. If any person whatsoever shall in plays, songs, or by other open words, speak any thing in derogation of the same book, or any thing therein contained; or shall by open fact cause or procure any minister in any place to say common prayer openly, or to minister any sacrament, in other form, or shall interrupt or let any minister to say the said common prayer; he shall (being indicted for the same at the next assizes) forfeit to the king for the first offence 100 marks, and for the second 400 marks; (which if not paid in 6 weeks after conviction, he shall suffer 6 months imprisonment for the first offence, and 12 months for the second;) and for the third offence shall forfeit all his goods and chattels, and be imprisoned during life. *1 El. c. 2. f. 9, 10, 11, 12, 13, 20.*

Resident incumbent to read the common prayer once a month.

4. Where an incumbent resides upon his living, and keeps a curate, the incumbent himself (not having lawful impediment to be allowed by the bishop) shall at least once a month openly and publicly read the common prayer, and (if there be occasion) administer the sacraments, and other rites of the church; on pain of 5*l.* to the poor, on conviction by confession, or oath of two witnesses, before two justices; and in default of payment in ten days, the same to be levied by the churchwardens or overseers by distress and sale, by warrant of such justices. *13 & 14 C. 2. c. 4. f. 7.*

Confession.

CONFESSION is twofold, either *express* or *implied*.

An *express* confession is, where a person directly confesses the crime with which he is charged; which is the highest conviction that can be. 2 *Haw.* 333.

But it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 *H. H.* 225.

An *implied* confession is, where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court may accept of if they think fit, without putting him to a direct confession. 2 *Haw.* 333.

It seems that the confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. 2 *Haw.* 429.

All those who on their examination own themselves guilty of a felony alledged against them, and are charged in their *mittimus* with the felony so confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the party be guilty or innocent. 2 *Haw.* 97.

Conies. See **Game**.

Conjuration. See **Witchcraft**.

Conspiracy.

I. What it is.

II. How punishable.

I. What it is.

1. **B**Y the common law there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons

By the common law.

persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false. 1 *Haw.* 190.

By statute.

2. And conspiracy by statute is as follows: *Conspirators are they, that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move or maintain pleas; and such as retain men in the country, with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers; And stewards and bailiffs of great lords, who by their office or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.* 33 Ed. 1. ft. 2.

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of Lord *Coke*, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw.* 189. *L. Raym.* 1169.

But an *action* will not lie for the conspiracy, unless it be put in execution; for in such case, the *damage* is the ground of the action. *L. Raym.* 378.

Also it plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest, is the acquittal of that one also: And upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but as one person in law: But it is certain, that an action on the case, in the nature of a conspiracy, may be brought against one only: Also, it hath been resolved, that if such an action be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. 1 *Haw.* 192.

In the case of *K. against Cope* and others, *H. 5 G.* The husband, and wife, and servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was the king's card-maker. The evidence against them was, that they had at several times given money to the prosecutor's

appren-

apprentices, to put grease into the paste, which had spoiled the cards. But there was no account given, that ever more than one at a time was present, tho' it was proved they had all given money in their turns. It was objected, that this could not be a conspiracy; for several persons might do the same thing, without having any previous communication with each other. But it was ruled, that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. *Str.* 144.

In the case of *K.* against *Kinnerfley* and *Moore*, *T.* 5 *G.* An information was brought, setting forth that the defendants being evil disposed persons, in order to extort money from my lord *Sunderland*, did conspire together to charge my lord with endeavouring to commit sodomy with the said *Moore*. The defendant *Kinnerfley* only appears, and pleads to issue, and is found guilty. And now exception was taken in arrest of judgment, that to every conspiracy there must be two persons at least, whereas here is only one brought in and found guilty, and the other possibly may be acquitted. But it was answered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himself, and is not concluded by the verdict as *Kinnerfley* is, yet as the matter now stands, *Moore* himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one, before the trial of the other. And a case was quoted, where several were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there must be three to make a riot; but upon the words, *with many others*, judgment was given against the defendants. And the court over-ruled the exception. And the defendant had sentence. And in the *Easter* term following, *Moore* also was convicted and had judgment. *Str.* 193.

And, *E.* 18 *G.* 2. *K.* against *Eliz. Niccols*. She was indicted for conspiring with *Tho. Bygrave*, unjustly to charge *William Frankland* with a robbery, and for that purpose going before a justice, where *Bygrave* swore it upon him, *Niccols* only came in, and pleaded not guilty. And the jury found that she was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conspiracy, and here is but one convicted. But the court over-ruled this, on the authority of *Kinnerfley's* case, in which case

there was a possibility of contradictory verdicts, which here cannot be. *Str.* 1227.

II. How punished.

On action:

1. It is clear, that those who are convicted of conspiracy at the suit of the party, shall have judgment of fine and imprisonment, and to render the plaintiff his damages.

1 *Haw.* 193.

On indictment
or information.

2. Also it is certain, that he who is convicted at the suit of the king, of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law (whereby he is disabled from being put upon any jury, or to be sworn as a witness, or even to appear in person in any of the king's courts), and also that his houses, lands and goods shall be seized into the king's hands, and his houses and lands stripped and wasted, his trees rooted up, and his body imprisoned. And this is commonly called *villainous* judgment, and is given by the common law, and not by any statute, and is said generally in some books to be the proper judgment upon every conviction of conspiracy at the suit of the king, without any restriction to such as endangered the life of the party; but this point doth not seem to be any where settled. 1 *Haw.* 193.

In the case of *Kinnerfley* and *Moore* above-mentioned, *Kinnerfley* was sentenced to be fined 500*l.* to suffer a year's imprisonment, and to find sureties for his good behaviour for seven years. *Moore* was sentenced to stand in the pillory, suffer a year's imprisonment, and to find sureties in like manner for seven years. *Str.* 196.

Constable.

THE office of a constable, in executing of warrants, is treated of under the titles *Arrest*, and *Warrant*; and in like manner the other particulars of his duty may be found under the respective titles throughout the book; this title treating only of the office of a constable in general.

- I. Of the antiquity and original of constables.
- II. Who shall be a constable.
- III. How chosen and sworn.
- IV. His power as a conservator of the peace.
- V. His duty as a subordinate officer to justices of the peace.
- VI. His indemnity and protection in his office.
- VII. Concerning the expences of his office.
- VIII. Concerning his account and removal from his office.

I. Of the antiquity and original of constables.

1. The sundry names of high constables, or constables of lathes, rapes, wapentakes, hundreds, and franchises; and the divers names also of petty constables, tythingmen, borsholders, boroheads, headborows, chief pledges, and such other (if there be any) that bear office in towns, parishes, hamlets, tythings, or borows, are all in effect but two, that is to say, *constables* and *borsholders*. Lamb. Const.

Antiquity of constables in general.

This word *constable* hath afforded matter of much disquisition to the learned. It is evidently a compound; but from what two original words it hath sprung, hath been variously conjectured. History traceth it from its arrival in *England*, backwards through *France*, and *Germany*, and *Greece*, to the imperial seat at *Constantinople* in the days of *Constantine* the great. From whence we ascend farther still towards the east, where we find the word *cône* or *cûne* in *Palestine*, which signified in the times of the old testament a stability, strength, or stay. Of which word there seem to be some traces in the mongrel name of *Laocoon* at *Troy*; and more especially of this same *Constantine*, who was himself of oriental extraction, having sprung from *Dardania*, a country of the upper *Moesia*, and was said by his flatterers to have been descended from *Dardanus* and the *Trojans*. And perhaps this appellation of the emperor might give occasion to the adopting of the word into the *Roman* language at that time. For it was then that the word *count* (the genuine offspring of *cône* or *cûne*) first became a name of dignity, and from thence travelled westwards (with a little variation according to the genius of each language) throughout the provinces. Amongst the

Saxons, the word was *koning* or *kyninge*, from whence undoubtedly we received our *English* word *king*. Again, the word *stole*, *stalle*, *stafle*, *stable*, by an easy transmutation of those letters frequent in almost all languages (and which seemeth the other constituent of the word *constable*) is likewise common to those languages of the middle ages, and signifieth a standing place, division, or department, called by the Romans *statio*; and all of them probably from the same origin with the Latin *sto*, and the ancient *Greek* word *σταω*. So that according to this etymology the word *constable* will properly signify the stability or stay of the place, or the strong man of the division. The *German* word is *connestafle*; the French *conestable*, the Italian *conestabile*; the Spanish *condestable*, from the word *conde* which they use for *count*. All which seem to be comprehended in the imperial denominations of the *Constantine* family, such as *Constans*, *Constantius*, *Constantinus*, *Constantia*, *Constantina*, *Constantianus*, *Constantinacius*, and the like.

As touching *borsholders* (which is the other general name, and doth contain within it the meaning of tything-men, borrowheads, headborows, thirdborows, and chief pledges) that is made up of the Saxon *borge*, *borrow*, or *borhoe*, a pledge, and *calder*, the elder, chief or head; and *borsh-c Calder* in one word doth mean the chief or head of the sureties or pledges. For the understanding whereof; it is to be remembred, that by the ancient laws of this realm (before the coming in of king *William* the conqueror) it was ordained for the more sure keeping of the peace, and for the better repressing of thieves and robbers, that all free born men should cast themselves into several companies, by ten in each company; and that every of those ten men of the company should be surety and pledge for the forthcoming of his fellows: so that if any harm were done by any of these ten, against the peace, then the rest of the ten should be amerced, if he of their company that did the harm should fly, and were not forthcoming to answer to that wherewith he should be charged. And for this cause, the companies are yet in some places of *England* called *boroas*, of the said word *borge*, *borrow*, or *borhoe*, signifying a pledge or surety; and in other places they are called *tythings*, because they contain (as hath been said) the number of ten men with their families. And even as ten times ten do make an hundred, so because it was then also appointed that ten of these companies should at certain times meet together for their matters of greater weight, therefore that general assembly, or court, was and yet is called a *hundred*. Furthermore, it was then also
ordained

ordained, that if any man were of so evil credit, that he could not get himself to be received into one of these tythings or boroës, then he should be shut up in prison, as a man unworthy to live at liberty, amongst men abroad. Now whereas every of these tythings or boroës did use to make choice of one man amongst themselves, to speak and to do, in the name of them all; he was therefore in some places called the tythingman, in other places the boroës elder, (whom we now call borsholder) in other places the borohead, or headborow, and in some other places the chief pledge, which last name doth plainly expound the other three that are next before it; for head or elder of the boroës, and chief of the pledges are all one; and in some shires, where every third borough hath a constable, there the officers of the other two are called *thirdborows*. And in these tythings, or boroës, fundry good orders were observed; and amongst others, first, that every man of the age of 12 years should be sworn to the king: Then, that no man shall be suffered to dwell in any town or place, unless he were also received into some such suretyship and pledge as is aforesaid: Thirdly, that if any of these pledges were imprisoned for his offence, then he ought not to be delivered without the assent of the rest of his pledges: Again, that no man might remove out of one tything or boroë, to dwell in another, without lawful warrant in that behalf: Lastly, that every of these pledges should yearly be presented and brought forth by their chief pledge, at a general assembly for that purpose, which we yet in remembrance thereof do call the *view of frankpledge*, or the leet court. *Lamb. Const.*

Some small shadow of which antiquity we seem still to retain in a common phrase in drinking. when a man says to another that he will *pledge* him; which is said to have begun when the *Danes* lorded it in this land; and the meaning was, to exhort the person to drink freely, for that the other would be surety to him that no one should do him any bodily harm whilst he was drinking.

Also we do still retain the word *borrow* as a verb in our language, signifying to take money upon pledge or surety.

2. By the statute of *Winchester*, *In every hundred and franchise two constables shall be chosen to make the view of ar-* Antiquity of high constables.
mour; and they shall present defaults of armour, and of suits of towns, and of highways, and such as lodge strangers in uplandish towns, for whom they will not answer. 13 Ed. 1. ff. 2. c. 6.

And

And from hence lord *Coke*, and others, will have it, that high constables are no ancients than this statute : But Mr. *Hawkins* (agreeably with *Lambard*, *Dalton*, and other authorities) says, that it seems to be the better opinion, that both constables of hundreds, which are commonly called high constables, and also constables of tythings, which are at this day commonly called petty constables, or tythingmen, were by the common law, and not first ordained by the said statute of *Winchester* ; for that statute doth not say, that there shall be such officers constituted, but clearly seems to suppose that there were such before the making of it. 2 *Haw.* 61.

In short, the truth of the matter seems to be this : The far greatest part of the business of high constables at this day, is not at all appropriated to them, as high constables ; but only as officers to execute the precepts of the justices of the peace, which any other person may do as well as they. The original and proper authority of an high constable, as such, seems to be the very same and no other, within his hundred, as that of the petty constable within his vill ; and therein most probably, he is coeval with the petty constable. The other usual branches of his office, such as the surveying of bridges, the issuing precepts concerning the appointing of overseers of the poor, surveyors of the highways, assessors and collectors of the land tax and window duties, and in like manner the viewing of armour by the abovementioned statute, are in him, not of necessity, but as matter of convenience, and it is discretionary in the justices whom they will appoint to be their officers in these cases ; others have been super-added to their office, for the like reason of convenience, by sundry acts of parliament, such as the issuing precepts for the licensing of alehouses, for levying the county rates, and for returning lists of jurors ; for that one person can do all the same much easier and cheaper, than so many different persons.

II. Who shall be a constable.

Women

1. It hath been said, that a custom in a town, that the inhabitants shall serve the office of constable by turns, according to the situation of their several houses, is not good ; for that by such a course, it may come to a woman's turn to be a constable, as inhabitant of one of those houses ; yet we find such customs allowed to be good in later books ; and it seems, that the consequence of the reasoning above-mentioned

mentioned may well be denied, since a woman in such case may procure another to serve for her. 2 *Haw.* 63.

2. Also it seems, that a practising physician, being ^{Physicians.} chosen constable in pursuance of such custom, has no remedy for his discharge; for that there are no precedents of this kind, and his calling is private. 2 *Haw.* 63.

But by the 32 *H.* 8. c. 40. The president, commons, and fellows of the faculty of physick in *London*, shall not be chosen constables.

3. And by the 5 *H.* 8. c. 6. and 18 *G.* 2. c. 15. ^{Surgeons.} Surgeons in *London* shall be freed and exempted from the office of constable.

In the case of *K. and Pond, M.* 5 *G.* On an indictment against *Pond*, a surgeon, for refusing to be constable, it was moved to the attorney general that a *nolle prosequi* might be granted, for that by the 5 *H.* 8. c. 6. (and by the 32 *H.* 8. c. 42. for the incorporating of barbers and surgeons, which incorporation was dissolved by the above act of 18 *G.* 2.) all persons of the corporation of surgeons within *London* are exempt; and tho' it hath been held that physicians are not exempt, yet by the equity of those statutes, and by the custom of the realm, all surgeons have been allowed the same privilege: And therefore a *nolle prosequi* was allowed, unless cause shewn. And no cause was shewed, the reporter says, that ever he heard of. *Comyns* 312.

4. By the 6 & 7 *W.* c. 4. Apothecaries in *London*, and ^{Apothecaries,} within seven miles thereof, being free of the company of apothecaries; and also those in the country who have served seven years apprenticeship, shall be exempted from the office of constable.

5. Also it seems certain, that if a sworn attorney, or ^{Attornies.} other officer, of the courts at *Westminster*, be chosen into this office, he may have a writ of privilege for his discharge, by reason of his necessary attendance in those courts: And it hath been resolved, that such officers shall have this privilege, not only where there is no special custom concerning the election of constables, but also where they are chosen by a particular custom, in respect of their estates, or otherwise; for that no such custom shall be intended to be more ancient than the usages of those courts, and therefore shall give way to them. 2 *Haw.* 63.

6. And upon the like reasons, it is taken for granted, that practising barristers at law, and the servants ^{Barristers at law, servants to members of parliament.} of members of parliament, have the same privilege; but there seem to have been no resolutions to this purpose. 2 *Haw.* 63.

Aldermen of
London.

7. Also it hath been resolved, that an alderman of *London*, for the like reasons, is not compellable to be a constable. 2 *Haw.* 63.

Captain of the
guards.

8. But it hath been holden, that a captain of the king's guards, being presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for that notwithstanding he is bound by his office to personal attendance on the king's person, yet such office being of late institution, shall not prevail against an ancient custom. 2 *Haw.* 63.

Militia man.

9. But a person serving for himself as a private man in the militia, shall during the time of such service be exempted from the office of constable. 2 *G.* 3. c. 20. s. 76.

Where there are
others sufficient.

10. Yet if such an officer as before mentioned, or a gentleman of quality who hath no such office, or a practising physician, be chosen constable of a town, which hath sufficient persons besides to execute this office, and no special custom concerning it; perhaps he may be relieved by the king's bench; but it seems that even a custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them to execute it. But these points seem not to be settled. 2 *Haw.* 63.

Dissenting
teachers.

11. By the 1 *W.* c. 18. s. 11. Every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, shall from the time of his subscription and taking the oaths, be exempted from the office of constable.

Prosecutors of
felons.

12. And by 10 & 11 *W.* c. 23. s. 2, 3. The prosecutor of a felon to conviction, or person to whom he shall assign the certificate thereof, shall be discharged from the office of constable.

Whether he may
appoint a deputy.

13. Inasmuch as the office of a constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself; yet it doth not seem to be settled, that a constable can make a deputy, without some special cause. 2 *Haw.* 62.

And the superior must be answerable for his deputy, upon any miscarriage; unless the deputy is duly allowed and sworn; for then he is constable. *Wood b.* 1. c. 7.

Dissenters ap-
pointing a de-
puty.

14. And by 1 *W.* c. 18. s. 7. If any person dissenting from the church of *England*, shall be chosen constable, and shall scruple to take upon him the office, in regard of the oaths, or any other matter required to be done in respect of such office; he may execute it by a sufficient deputy by him

him to be provided, to be allowed by such persons, and in such manner, as such officer should have been allowed.

III. How chosen and sworn.

1. It seemeth, regularly, that the petty constable ought to be chosen in the leet; and the high constable (properly so called) in the torn, which is the general leet of the whole hundred: and if there be no leet, then that the petty constable ought to be chosen also in the torn. By whom to be chosen.

But whether they are to be chosen and appointed by the suitors in the respective courts, or by the lord or his steward in the leet, and the sheriff in his torn, seemeth not clearly determined. *2 Haw. 62.*

2. But by which of them soever they shall be chosen and appointed, it seemeth clear, that they are to be sworn and placed in their office, by the lord or his steward, or by the sheriff respectively, as being judge of the court. By whom to be sworn.
2 Haw. 62.

3. Also it seems certain, that a custom for choosing a constable either way is good; and it seems to have been the opinion of the makers of the act of 13 & 14 C. 2. hereafter following, that the lords of the courts leet have this power of common right, and consequently the sheriff in his torn, where there is no court leet. Custom of choosing.
2 Haw. 63.

Anciently the practice was, that in every hundred where there was a feudal lord, the constables were sworn in and admitted by the lord or his steward in his leet; but where there was no such feudal lord, the sheriff in his torn had the swearing and placing of them in: Also if there was no feudal lord of the hundred, an annual officer was chosen, who was to preside over the whole hundred, who was called the high constable; but if the hundred was feudal, as it often anciently was, then such lord of the hundred administered the office himself. *1 Bac. Abr. Const. A.*

4. But now the usual manner is, that the high constables of hundreds be chosen either at the sessions, or by the greater number of the justices of the division; and likewise that they be sworn at sessions, or by warrant from the sessions; which course hath been often allowed and commended by the justices of assize. Choosing high constables.
Dalt. c. 28.

And the reason thereof may be this, as hath been intimated above; namely, that their office at present doth not so much consist in executing the office of high constable as such, as in executing the justices precepts, which they

Petty constables
appointed by ju-
stices of the
peace.

may do for the most part, whether they be indeed high constables or not.

5. And moreover, every petty constable, being a principal peace officer, and it being necessary for the preservation of the peace, that every vill should be furnished with one; the justices of the peace have ever since the institution of their office, taken upon them as conservators of the peace, not only to swear the petty constables, which have been chosen at a torn or leet, but also to nominate and swear those who have not been chosen at any such court, on the neglect of the sheriffs or lords to hold their courts, or to take care that such officers are appointed in them. And this power of justices of the peace having been confirmed by the uninterrupted usages of many ages, shall not now be disputed, but shall be presumed to have been grounded on sufficient authority. And some have carried this point so far, as to allow the justices at their sessions, to swear one who was chosen at the leet, and unduly rejected by the steward, who had sworn another in his place. 2 *Haw.* 65.

And in the case of *K. and Dr Franchard*, *H.* 14 *G.* 2. Dr Franchard was chosen constable of *Milborne Port* at the leet, which immediately adjourned; and he was afterwards sworn in by a single justice of the peace: And upon motion for an information as not being duly sworn, the court held this to be a good swearing. *Str.* 1149.

Where no con-
stable hath been
before.

6. *M.* 21 *C.* 2. The justices of the county of *Northampton*, at their general sessions chose a constable for *Holmby*; and for not coming in to take the oath, proceeded against him. Which proceedings being removed by certiorari into the king's bench, it was moved on affidavits that there had not been a constable there for 50 years before, that he might be discharged; alledging likewise, that *Holmby* was a privileged place, and that all the inhabitants were the duke of *York's* tenants: But the court held, that they could not discharge him on motion, and said, that they must determine the matter by action of false imprisonment, or some other way; and inclined strongly that he could not any way be discharged: For, by the court, Tho' originally constables were chosen in leets, yet the constable being an officer whose duty it is to keep the peace, the justices may chuse him in cases of necessity; as in the hamlets about the tower, the justices, by reason of the increase of buildings, where there was formerly but one constable, did chuse five; and it was ruled they might do so; and they seemed to incline, that tho' formerly

merly there had been none, yet they might chuse one if they should think it convenient. 1 *Bac. Abr.* Const. A.

7. However, it is certain, that justices of the peace had power to nominate and swear constables, on the default of the torn or leet, before the statute of 13 & 14 C. 2. c. 12. and therefore, that they have such authority in some cases not mentioned in that statute; which enacts, that if a constable shall die, or go out of the parish, any two justices may make and swear a new one, until the lord shall hold a leet, or till the next sessions, who shall approve of the officer so made and sworn, or appoint another: and if any officer shall continue above a year in his office, the justices in sessions may discharge him, and put in another till the lord shall hold a court as aforesaid. 2 *Haw.* 65. 13 & 14 C. 2. c. 12. s. 15.

Where the leet shall make default.

8. And it seems to be clear at this day, that the king's bench hath power by mandamus to compel the court or judge to swear a constable duly chosen. 2 *Haw.* 65.

Mandamus to compel the swearing a constable.

9. Constables lawfully chosen, if they shall refuse to be sworn, a justice of the peace may bind them over to the assizes or sessions (there to be indicted). *Dalt.* c. 28.

Constable refusing to be sworn.

10. But it seemeth that the sheriff, or steward of the leet, cannot lawfully commit them for such refusal, without more; but it is said, that if the party be present in the court, he may be fined; and that if he be absent, and have a certain time and place appointed him by the sheriff or steward, for the taking of the oath before a justice of the peace, and have also express notice of such appointment, and be presented at the next court, for having refused to take it accordingly, he may be amerced: also it seems, that in either case he may be indicted (A) either at the assizes or sessions. And it is adviseable in all pleadings, in any action concerning such a fine or amerciaments, and in all indictments for such refusal, specially and expressly to set forth the manner of every such election, appointment, notice, and refusal, and before whom the court was holden: and it hath been adjudged, that it is insufficient to say in general, that the party was duly elected, or lawfully elected, or that he had notice, without setting forth the special circumstances thereof. Also it is said to have been adjudged, that an indictment for not finding a sufficient person to serve the office of constable, without shewing that the party refused to serve it himself, is insufficient. 2 *Haw.* 64.

How punished,

11. There is a long form of a constable's oath in *Dalt.* Const. c. 12m, which is adopted by Mr. *Bac.* expressing his duty in many instances; but as that form notwithstanding doth not

contain the hundredth part of the constable's duty, nor indeed the most material instances of it, it may be more eligible (as no particular form is directed by any statute) to swear him (B) to the due execution of his office in general, than to descend to those particulars; lest by mentioning some parts of his duty, and not others, he may be induced to think, that those others are not so necessary.

Oaths of allegiance and supremacy.

12. By the 1 G. 2. c. 13. High constables are to take the oaths of allegiance, supremacy, and abjuration, as other persons who qualify for offices; but they are not within the statute of the 25 G. 2. c. 2. as to receiving the sacrament, and subscribing the declaration against transubstantiation; and petty constables are exempted both from the one and from the other.

IV. His power as a conservator of the peace.

Constable a conservator of the peace.

1. Every high and petty constable are by the common law conservators of the peace. 2 Haw. 33. Crom. 6. Dalt. c. 1.

May commit for an affray in his presence.

2. And therefore if any man shall make an affray or assault upon another in the presence of the constable, or shall threaten to kill, beat, or hurt another, or shall be in a fury ready to break the peace; the constable may commit him to the stocks, or other safe custody for the present, and after may carry him before a justice, or to gaol, until he shall find surety for the peace, which surety the constable himself may also take by obligation, to be sealed and delivered to the king's use, and if the party will not find surety to the constable, he may imprison the party until he shall do it. Dalt. c. 1.

But not when he is absent.

3. But he may not require surety of the peace, unless the offence be upon his own view, and not if it be committed out of his sight; for he cannot take any man's oath that he is afraid of death, because he is not a judge of record; which is the reason that an obligation taken by him, shall be in his own name, and not in the king's name; and the same shall be certified at the sessions of the peace. Cro. Eliz. 375, 376.

V. His duty as a subordinate officer to justices of the peace.

Subordinate to the justices of the peace.

It hath been always holden, that the constable is the proper officer to a justice of the peace, and bound to execute his warrants; and therefore it hath been resolved, that where a statute authorizes a justice of the peace to convict

convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it. 2 *Haw.* 262.

VI. His indemnity and protection in his office.

1. If an action is brought against a constable, for any thing done by virtue of his office; he, and also all others which in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence, and if he recovers, he shall have double costs. 7 *J. c.* 5. Double costs.
2. And such action shall be laid in the county where the fact was committed, and not elsewhere. 21 *J. c.* 12. Proper county.
3. Formerly the constable was bound to take notice of the jurisdiction of the justice; inasmuch that if the justice issued a warrant in any matter wherein he had no jurisdiction, the constable was punishable for the execution of it; but now, by the statute of 24 *G. 2. c.* 44. it is enacted; No action if he delivers a copy of the warrant.

That no action shall be brought against any constable, or other person acting by his order, and in his aid, for any thing done in obedience to the warrant of a justice of the peace, until demand hath been made, or left at the usual place of his abode, by the party, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand: and if after compliance therewith, any such action shall be brought, without making the justice who signed such warrant defendant, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the justice. And if such action be brought jointly against the justice and constable; on proof of such warrant, the jury shall find for the constable, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict be given against the justice, the plaintiff shall recover his costs against him, to be taxed in such manner by the proper officer, as to include such costs as the plaintiff is liable to pay to such defendant, for whom such verdict shall be found as aforesaid. *J.* 6.

Note; By this it seemeth, that the constable ought not to return the warrant to the justice, but to keep it for his own justification; for he cannot grant to the party

the perusal of the warrant, unless he hath it: but he must certify to the justice what he hath done in the execution thereof.

tion but
six
months.

4. And no action shall be brought against any constable, but within six months after the act committed. 24 G. 2. c. 44. s. 8.

Constable as-
saulted need not
go back to the
wall.

5. And if the constable is assaulted in the execution of his office, he need not go back to the wall, as private persons ought to do: and if in the striving together, the constable kills the assailant, it is no felony; but if the constable is killed, it shall be construed premeditated murder. *Hale's Pl. 37. 1 H. H. 457.*

VII. Concerning the expences of his office.

Charges of mak-
ing distresses.

1. By the 27 G. 2. c. 20. The constable executing a justice's warrant, for levying a penalty, or other sum of money directed by an act of parliament, by distress, may deduct his own reasonable charges of taking, keeping, and selling the goods distrained; returning the overplus on demand, after such penalty or sum of money and charges deducted.

Charges of con-
veying an offen-
der to gaol.

2. A person committed to gaol, for any misdemeanor, shall bear his own charges (if able) for conveying or sending him to the said gaol, and the charges of those that guard him thither; and if he shall refuse at the time of commitment to defray the same, or shall not then pay the same, the justice committing him, shall by warrant to the high or petty constable where the person shall inhabit, or from whence he shall be committed, or where he shall have any goods within the county, order so much to be sold thereof, as by his discretion shall satisfy the same; the appraisement to be made by four honest inhabitants. 3 J. c. 10. s. 1.

And if he have not money nor goods within the county, sufficient to bear the charges of himself and of those who convey him to the gaol, or house of correction, the constable may make application to a justice, who may upon oath examine into and ascertain the reasonable expences, and shall by his warrant (without fee) order the treasurer to pay the same; except in *Middlesex*, where the same shall be paid by the overseers of the parish where the person was apprehended. 27 G. 2. c. 3.

Charges about
vagrants.

3. And by the 13 & 14 C. 2. c. 12. it is enacted, that whereas constables may be at great charge in relieving, conveying with passes, and in carrying rogues, vagabonds, and sturdy beggars to the house of correction, and have

have no power to make rates to reimburse themselves; therefore the said constables, together with the churchwardens and overseers, and other inhabitants shall make a rate in like manner as the poor rate by the 43 *El. c. 2.* which being confirmed under the hands and seals of two justices, may be levied by distress.

Mr. *Nelson* and Mr. *Shaw* say, that this rate may be made for the purpose abovementioned, and for *other parish charges*; and direct five different forms of instruments to compel the payment thereof, setting forth therein generally, that the rates are to be made and levied for reimbursing the constable's necessary charges in the execution of his office. But there seems to be no such power given by the statute; for it is limited to expences about vagrants only; and even that seems to be rendred useles, by the vagrant act of 17 *G. 2.* which orders the said expences to be paid out of the general county rate.

Neither is any such power given by any other statute; which indeed is hard upon the constable. It is but reasonable, that the justices should have power given by some act of parliament, to allow to the constable in all cases, a competent satisfaction for his trouble: for there seemeth to be no cause, why a constable who hath himself been guilty of no crime, should be at much trouble and expence about those who have, and have no compensation for it.

VIII. Concerning his account and removal from his office.

1. The high constables shall at the general or quarter *Account.* sessions, if thereunto required, account for the general county rate by them received; on pain of being committed to gaol until they shall account; and shall pay over the money in their hands, according to the order of the said court, on the like pain: And all their accounts and vouchers shall, after having been passed at the said sessions, be deposited with the clerk of the peace, to be kept amongst the records, and inspected by any justice without fee. 12 *G. 2. c. 29. s. 8.*

2. And in such manner as constables are to be chosen, *Removal,* in the same manner, and by the like authority are they to be removed; so as if there shall be cause to remove and put an high constable from his place, it hath not been thought fit, that any one or two justices should do it upon their discretion, but that it should be done by the greater part of the justices of that division, and that for
some

some just cause; or else that it be done at the sessions. *Dalt. c. 28.*

And it seems clear, that the sheriff or steward of the leet, having power to place a constable in his office, have by consequence a power of removing him. *2 Haw. 63.*

And also the justices of the peace have always used, for good cause, to displace all such constables, as have been chosen and sworn by them. *2 Haw. 65.*

And by the 13 & 14 C. 2. c. 12. If a constable shall continue above a year in his office, the sessions may discharge him, and put another in his place, till the lord shall hold a leet. *f. 15.*

And if the court, or other judge, shall refuse to discharge a constable, the king's bench may compel them by *mandamus*. *2 Haw. 65.*

A. Indictment for not taking the office.

THE jurors for our lord the king upon their oath present, that A. O. late of ——— in the township of ——— in the said county, yeoman, on the ——— day of ——— in the ——— year of the reign of ——— and long before, and always after until the day of the preferring of this indictment, was and is an inhabitant and residing within the township of ——— aforesaid in the county aforesaid, and an able person to serve the office of constable for the same township; and he the said A. O. on the said ——— day of ——— in the year aforesaid, in the township aforesaid, at the court leet of A. L. lord of the manor of ——— aforesaid, holden before A. S. gentleman, steward of the said court, by the suitors of the said court, was elected and chosen, according to the ancient custom of chusing constables for the said township, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; [or otherwise as the custom shall be for chusing constables:] and that the said A. O. afterwards, to wit, on the ——— day of ——— in the year aforesaid, at the township of ——— aforesaid, had due notice given to him by A. B. bailiff of the aforesaid manor, of his being so elected and chosen constable as aforesaid, and then and there was by him the said A. B. required to appear before J. P. esquire, then and yet one of his majesty's justices assigned to keep the peace within the said county, and also to hear and determine divers felinits, trespasses and other misdemeanors in the said county committed, on the said ——— day of ——— in the year aforesaid, to take his oath for the due executing the said office of constable for the same township, according to the duty of that office; nevertheless

theless the said A. O. his duty in that behalf not regarding, but contriving and intending wholly to neglect to serve the said office of constable, after he the said A. O. was so elected and chosen into the said office as aforesaid, to wit, on the said ——— day of ——— in the year aforesaid, and continually afterwards until the day of taking this inquisition, at the township aforesaid in the county aforesaid, unlawfully and contemptuously did refuse, and still doth refuse, to take his said oath for the due executing the said office of constable, and in any wise to execute the same office, to the great hindrance of justice, in contempt of our said lord the king, and to the evil example of all others in the like case offending, and against the peace of our said lord the king.

B. Constable's Oath.

YOU shall well and truly serve our sovereign lord the king, [and the lord of this leet, if sworn in a court leet] in the office of constable, for the township of ——— for the year ensuing [or, until you shall be lawfully discharged therefrom; or, until another shall be sworn in your place:] You shall well and truly do and execute all things belonging to the said office, according to the best of your skill and knowledge: So help you god.

Conviction.

THE power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter, even for time immemorial, beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of the office of a justice of the peace; but the intendment will be against it. Therefore where a special power is given to a justice of the peace by act of parliament to convict an offender in a summary manner, without a trial by jury, it must appear that he hath strictly pursued that power; otherwise the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is dispensed withal, yet he must proceed nevertheless according to the course of the common law in trials by juries, and consider himself only as constituted

constituted in the place both of judge and jury. Therefore there must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves of, unless the statute specially directeth otherwise; then, if the person is found guilty, there must be a conviction, judgment, and execution, all according to the course of the common law, directed and influenced by the special authority given by statute; and in the conclusion, there must be a *record* of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as if he shall be called to account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.

The difficulty of drawing up a conviction in due form, hath induced the legislature to institute a more apt and compendious method in divers instances; and it were to be wished, in case of the justices, that this provision might be made more general. These summary forms of convictions, which are specially directed by act of parliament, are interspersed throughout this book under the titles to which they do respectively belong.

Other forms of convictions, which are left at large according to the course of the common law (having no prescriptive form of words directed by any act of parliament) are likewise drawn forth at length under divers titles; particularly, concerning such matters as have been often controverted in the courts above, occasioned either by the largeness of the penalties, or sometimes by the greatness of the offenders; as in cases of riots, forcible entries, deer stealing, and such like.

It remaineth, under this title, to insert one general precedent or form of conviction for the whole; which may be to the effect following:

General form of conviction.

Westmorland. **B**E it remembred, that on the——day of———in the——year of the reign of———by the grace of god, of Great Britain, France and Ireland, king, defender of the faith, and so forth, at———in the county of———aforesaid, A. I. of———cometh before me I. P. Esquire, one of the justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county, and also to hear and determine divers felonies, trespasses, and

and other misdemeanors in the said county committed, [residing near to the place where the offence herein after mentioned was committed; or as the statute requires] and giveth me the said justice to understand and be informed, that one A. O. of— in the said county, yeoman, on the—day of—now last past, at—in the said county, did [here set forth the fact, in the words of the statute as near as may be] against the form of the statute in such case made and provided: And afterwards, upon the aforesaid—day of—in the year aforesaid, at—aforesaid, in the county aforesaid, he the said A. O. after being duly summoned in this behalf before me the justice aforesaid appeareth and is present, in order to make his defence against the said charge contained in the said information, and having heard the same, he the said A. O. is asked by me the said justice, if he can say any thing for himself, why he the said A. O. should not be convicted of the premises above charged upon him in form aforesaid; who pleadeth that he is not guilty of the said offence. Nevertheless, on the—day of—aforesaid, in the year aforesaid, at—aforesaid in the county aforesaid, one credible witness, to wit, A. W. of—yeoman, cometh before me the justice aforesaid, and before me the same justice upon his oath on the holy gospel to him then and there by me the justice aforesaid administered, deposeth, sweareth, and on his oath aforesaid affirmeth and saith, that the aforesaid A. O. on the—day of—aforesaid, in the year aforesaid, at—aforesaid, in the county aforesaid, did [here again set forth the fact, or so much thereof as is sufficient to convict the offender] And thereupon the aforesaid A. O. the—day of—aforesaid, in the year aforesaid, before me the justice aforesaid, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid is convicted; and for his offence aforesaid hath forfeited the sum of—of lawful money of Great Britain, to be distributed as the statute aforesaid doth direct. In witness whereof, I the said justice to this present record of the conviction as aforesaid, have set my hand and seal at—aforesaid, in the county aforesaid, the day and year first above-written.

If he confesses the fact then say,——And because the said A. O. hath nothing to say, nor can say any thing in his own defence touching and concerning the premises aforesaid, but doth of his own accord freely and voluntarily acknowledge and confess all and singular the said premises to be true, in manner and form as the same are charged upon him in the said information; and because all and singular the premises being heard and fully understood by me the said justice, it manifestly appears to me——Or, if the party hath been summoned,

and doth not appear, then say, — *Whereupon, on the said — day of — in the year aforesaid, at — aforesaid, in the county aforesaid, he the said A. O. was duly summoned in this behalf, to appear before me, in order to make his defence against the said charge contained in the said information, but the said A. O. doth neglect to appear before me, and doth not appear, nor make any defence against the said charge as aforesaid: Therefore I the said justice, on the said — day of — in the year aforesaid, at — aforesaid, in the county aforesaid, do proceed to examine into the truth of the said complaint; And A. W. of — a credible witness, cometh before me the justice aforesaid, and before me the same justice upon his oath, &c.*

Cometh before me] A conviction ought to be in the present tense, and not in the time past. *L. Raym. 1376. Str. 608. Roberts's case.*

And giveth me to understand and be informed] A conviction ought to be on an information or complaint precedent. *M. 11 W. K. and Fuller. L. Raym. 510.*

That one A. O. of — in the said county, yeoman, &c.] All acts which subject men to new and other trials, than those by which they ought to be tried by the common law, ought to be taken strictly; and the court of king's bench will require, that it do appear upon the face of such proceedings, that the fact was an offence within the act, and that the justices have proceeded accordingly. *M. 1 An. K. and Chandler. 1 Salk. 578. L. Raym. 581.*

Therefore the particular manner of the offence ought to be set forth. Thus in the case of swearing, before the legislature by the act of the 19 G. 2. had directed a summary form of words, for the conviction, it was required not only to set forth that the person had cursed or sworn in general, but the particular oaths and curses were to be set forth, that the court might judge thereupon, whether they were indeed oaths and curses or not. *H. 8 G. K. and Sparling. Str. 497.*

And in the case of *K. and Roberts, M. 11 G.* which was a conviction for swearing 150 oaths in these words *by god*, and cursing 150 curses in these words *god damn you*, this matter was carried so far, that it was insisted this was not sufficient, but that the oaths and curses ought to have been set forth 150 times each. But the oaths and curses being all only in the same words over again, the court held the conviction good. *Str. 608. L. Raym. 1376.*

And it seemeth, that a conviction on a penal statute ought expressly to shew, that the defendant is not within any of its provisoes; for since no plea can be admitted to such a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty, and satisfy the court, that the defendant had no such matter in his favour, as the statute itself allows him to plead. 2 *Haw.* 250.

But in the case of *K. and Ford, T. 9 G.* There was a conviction on the 3 *C. c. 3.* for keeping an alehouse without licence; and it was objected, that in the act there is a proviso to exempt persons who have been punished by the former law of the 5 & 6 *Ed. 6. c. 25.* and therefore it should have been said, he had not been proceeded against upon that act: But by the court, That coming in by way of proviso, he should have insisted on it in his defence; it appears he was asked what he had to say, and therefore we may reasonably presume he had no such defence to make. And the conviction was confirmed. *Str.* 555.

And in the case of *K. and Bryan, M. 12 G. 2.* The defendant was convicted on the gin act; and an exception was taken, that there was no averment, that it was not sold to be used in medicine: and the cases on the game act were mentioned, where in convictions it is necessary to exclude all the qualifications for killing game. On the other hand, it was insisted, that the reason of that was, because those were in the enacting clause, whereas this about medicine comes in by way of proviso, and is by way of defence to be shewn on the defendant's part: And for that purpose was cited, *M. 11 G. K. and Theed;* where in a conviction for obstructing an excise officer on the 8 *An. c. 9.* it was objected, that it not being averred to be in the day, it should have been shewn that there was a constable present, which is made necessary in the night; but was held to be well, and its being in the night, should have been shewn on the defendant's part. And by the court, This is brought within the general enacting clause: and the true distinction is, where the extenuation comes in by way of proviso or exception. And the conviction was confirmed. *Str.* 1101.

Being duly summoned] *T. 11 G. K. and Venables.* The court were unanimously of opinion, that the party ought to be heard, and for that purpose ought to be summoned in fact; and that if the justices proceeded against a person without

without summoning him, it would be a misdemeanor in them, for which an information would lie. *L. Raym.* 1406.

And in the case of *K. and Allington*, *H. 12 G.* On affidavit that no summons was had, the court granted an information against the justice who made the conviction. *Str.* 678.

H. 6 G. K. and Johnson. The defendant was convicted for keeping a gun. And exception was taken, that there was not a *reasonable* summons; for it was made to appear the same day, which might be impossible upon account of the distance, or the summons being served late, and his witnesses might not be got together on so short a warning: then it was to appear at *the parish aforesaid*, whereas there were two parishes mentioned before; so the man might have gone to one, whilst they were convicting him at the other. It was answered, that the defendant appeared at the time, and made defence; so that cures all defects in the summons. And by the court, The answer is right. *Stra.* 261.

H. 3 G. K. and Simpson. The defendant was convicted for deer stealing; and the conviction set forth, that he had been summoned to appear before the justices, but it did not appear he ever was before them. Exception was taken to this, that as no appeal lies in this case, the justices should not have proceeded in the absence of the party, especially where it may end in a corporal punishment as it may do here for a want of a distress. And at another day, on consideration, *Parker C. J.* delivered the resolution of the court: We are all of opinion, the offender may be convicted, without appearing. The statute is silent as to the method of proceeding, and the law of *England*, it is true, in point of natural justice, always requires the party charged with any offence, to be heard before he be condemned in judgment; but that rule must have this exception, unless it is through his own default; were it otherwise, every criminal might avoid conviction. *Str.* 44.

But, generally, it is not necessary to *set forth the summons in the conviction*; for although no summons is set forth, yet the court will intend one: but where a summons is set forth, and that summons appears to be irregular, the court will quash the conviction, there being then no room to intend any other summons. *11 G. K. and Venables.* *Sess. C. V. 1.* 210. *L. Raym.* 1405.

One credible witness, to wit, A. W. of———yeoman]
It is requisite to name the witness, that it may appear he
is

is not the same person who was the informer; for an informer who hath a share of the penalty, is never allowed to be a witness, unless in case where a statute shall specially so direct it.

On his oath aforesaid affirmeth and saith] In all convictions, being in the nature of judgments, the whole evidence ought to be set forth, or at least so much thereof as is sufficient to warrant the conviction; that the court of king's bench may judge of the sufficiency thereof: but otherwise it is in orders, which are authoritative. And so it was laid down in the case of *K. and Floyd*, *M. 8 G. 2.* which was thus; A motion was made to quash an order of sessions, made under the statute of the *1 W. c. 21. s. 6.* whereby the defendant was adjudged guilty *upon full proof* of the charge against him, and that he be discharged from his office of clerk of the peace, upon the objection that the evidence is not set out: But it was adjudged after consideration, that this was an order, and therefore the evidence need not be shewn; but that it would be otherwise if it was a conviction. *Andr. 82. Str. 996.*

M. 5 G. 2. K. and Theed. A conviction on the candle act was quashed, because the evidence was not set out; it being only alledged, that the offence was *fully and duly proved.* *Str. 919. Andr. 84.*

T. 6 G. K. and Baker. A conviction for taking pilchards, against the form of the statute quashed; because the witness swears generally that the defendant *is guilty of the premisses*, and that is taking upon himself to swear the law. *Str. 316.*

M. 11 W. K. and Fuller. A conviction ought to be certain, and not taken upon collection. *L. Raym. 510.*

And for his offence aforesaid hath forfeited] *H. 3 G. 2. K. and Hawks.* A conviction for killing a deer was quashed, because it was only—*he is convicted*, without any judgment of forfeiture. *Str. 858.*

To be distributed as the statute aforesaid doth direct] *M. 9 An. K. and Barret.* A conviction for deer stealing did set forth, that—*he is convicted, and shall forfeit 30l. according to the form of the statute*, without making a distribution, which ought to be 10l. to the informer, 10l. to the party grieved, and 10l. to the poor. But by the court, 'This is well enough; for by the statute he is only to forfeit in case he has goods, which is conditional, and not absolute. *1 Salk. 383.*

Note ; On a suggestion that the defendant hath a title to the thing in question, a prohibition will be granted by the king's bench, before or after conviction, to stay the justice from proceeding ; for without doubt if the defendant have but a colour of title, the justices have no jurisdiction in the cause, as where the defendant was convicted for cutting trees, where he had a right of common. *L. Raym.* 901.

Corn.

For the forestalling, ingrossing, or regrating of corn ; see title **Forestalling**.

For the licensing badgers of corn ; see title **Badgers**.

I. The measure of corn.

II. Cutting corn growing, or burning stacks of corn.

III. Exportation of corn.

IV. Importation of corn.

I. The measure of corn.

Buying corn in the sheaf without measuring.

Penalty of selling otherwise than by Winchester measure.

I. **T**O buy or sell corn in the sheaf, before it is threshed and measured, is against the common law of *England* ; and the reason thereof seemeth to be, for that by such sale the market is in effect forestalled. *3 Inst.* 197.

2. If any person shall sell corn otherwise than by *Winchester* measure, sealed and stricken by the brim, he shall forfeit 40 s. on conviction before one justice, on the oath of one witness ; to be levied by the churchwardens and overseers, or some of them, to the use of the poor, by distress and sale. In default of distress, imprisonment till paid. *22 C. 2. c. 8. s. 2.*

And if any mayor, or other head officer, shall knowingly permit the same, he shall, upon conviction thereof at the county sessions, forfeit 5 l. half to the prosecutor, and half to the poor, by distress and sale ; for want of distress, to be imprisoned by warrant of the justices, till payment be made. *s. 3.*

Further penalty.

3. And moreover, every person who shall sell or buy corn, without measuring, being thereunto required, or in any

any other manner than is by the 22 C. 2. c. 8. directed, and that without shaking of the measure by the buyer, he shall, beside the penalty of that act, forfeit all the corn so bought or sold, or the value thereof, to the party complaining. 22 & 23 C. 2. c. 12. §. 2.

And on complaint made to a justice of the peace, that corn hath been bought, sold, or delivered contrary to this act, the proof shall lie upon the defendant, to make it appear by the oath of one witness, that he sold or bought the same lawfully; wherein if he shall fail, he shall forfeit as is said before, to be levied by distress and sale; which shall by the justice be distributed, half to the poor, and half to the informer. 22 & 23 C. 2. c. 12. §. 3.

4. But notwithstanding all the statutes that have been made, for the uniformity of measures throughout the realm, yet the measure of corn differs in many places, the bushel being greater in one place than in another. And altho' regularly, a custom or prescription against a statute is void, except it be confirmed by the statute, or saved by another statute; yet it is said, that in the measure of corn, the custom of the place is to be observed, if it be a custom beyond all memory, and used without any visible interruption. *Barl.* 578. Difference of measures.

II. Cutting corn growing, or burning stacks of corn.

1. Every person who shall unlawfully cut or take away any corn or grain growing, being convicted thereof by confession, or oath of one witness, before one justice, shall for the first offence pay such damages as the justice shall appoint: and if the justice shall think him not able or sufficient, or if he do not pay such damages, he shall commit him to the constable where the offence is committed, or where the party is apprehended, to be whipped; and for every other offence he shall in like manner be whipped. The constable refusing, shall be committed by the justice, till he conform. 43 *El.* c. 7. Cutting corn growing.

But if he cut it at one time, and then come again at another time and take it away, it is felony. 1 *Hen.* 93.

2. If any person shall in the night time, maliciously and wilfully burn or cause to be burnt, any rick or stack of corn, he shall be guilty of felony: but to avoid judgment of death, he may make his election to be transported for seven years. And three justices (1 *Q.*) may determine the same. 22 & 23 C. 2. c. 7. Burning corn in the night.

3. But by the 9 *G.* c. 22. commonly called the Black Act, which is inserted more at large in the title of that act, Burning by night or day.

name, If any person shall set fire to any mow or stack of corn, he shall be guilty of felony without benefit of clergy. *f. 1.*

And the hundred shall answer the damages, not exceeding 200*l.* *f. 7, 8, 9, 10.*

And if any person shall apprehend, or cause to be convicted, such offender, and shall be killed, or wounded so as to lose an eye, or the use of any limb, in apprehending or endeavouring to apprehend such offender, on proof thereof at the sessions, and certificate thereof from thence, the sheriff shall pay to the person intitled the sum of 50*l.* in 30 days, to be repaid to him out of the treasury. *f. 12.*

III. Exportation of corn.

The king may prohibit by proclamation.

1. The king may at any time, by proclamation, prohibit the exportation of corn generally, or out of any special ports by name, for such time as shall be therein limited. *1 f. c. 25. f. 27.*

Duty on exportation taken off.

2. No duty or subsidy whatsoever shall be paid on the exportation of wheat, rye, barley, malt, beans, pease, or other grain, bread, biscuit, or meal. *11 & 12 W. c. 20. f. 4.*

Bounty on exportation.

3. But when malt or barley are at or under 24*s.* a quarter, rye 32*s.* wheat 48*s.* every person exporting the same in *English* shipping, shall have from the officers of the customs, for every quarter of barley or malt exported (ground or unground) 2*s.* 6*d.* of rye 3*s.* 6*d.* of wheat 5*s.* *1 W. c. 12.* And of wheat malt 5*s.* *5 Au. c. 29. f. 15.*

And by *5 An. c. 8. art. 6. & ch. 29. f. 10.* when oats do not exceed 15*s.* a quarter, a bounty of 2*s.* 6*d.* a quarter shall be paid for oatmeal exported.

Penalty of hindring exportation.

4. And if any person shall wilfully and maliciously beat, wound, or use any other violence to any person, with intent to hinder him from buying corn in any market or other place; or shall unlawfully stop or seize upon any waggon, cart, or other carriage, or horse, loaded with wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market town, or sea port, and wilfully and maliciously break, cut, separate, or destroy the same, or any part thereof, or the harness of the horses drawing the same; or shall unlawfully take of, drive away, kill, or wound any such horses; or unlawfully beat or wound the driver; or shall by cutting of the sacks, or otherwise, scatter or throw abroad such wheat, flour, meal, malt, or other grain, or shall take and carry away, spoil, or damage the same, or any part thereof: every such

such person, being convicted thereof, before two justices or the sessions, shall be sent to the gaol or house of correction, for any time not exceeding three months, nor less than one month, and be once publicly and openly whipped by the master of such gaol or house of correction, in such city, market town, or sea port, in or near which the offence shall be committed, on the first convenient market day, at the market cross, or market place there, between the hours of 11 and 2. 11 G. 2. c. 22. *f. 1.*

And if any such person so convicted, shall commit any of the offences aforesaid a second time; or if any person shall wilfully and maliciously pull down, throw down, or otherwise destroy any storehouse, or granary, or other place where corn shall be then kept in order to be exported; or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom, or otherwise spoil or damage any meal, flour, wheat, or grain therein, intended for exportation: every person so offending, and being thereof lawfully convicted, shall be adjudged guilty of felony, and be transported for seven years. *f. 2, 3.*

And the hundred shall be liable to answer damages (not exceeding 100*l.*) to be sued for and levied as in cases of robbery; the person injured giving notice of the offence in two days, by himself or servant, to a constable of the hundred, or the constable of the place in or near which the fact shall be committed; and within ten days after such notice, giving in the examination on oath of himself, or of his servant present at the time of the fact, or having the care of such his property, before a justice of the peace, whether he knows the persons that committed the fact, or any of them; and if he confesses that he does, then the person so confessing, entering into recognizance to prosecute. 11 G. 2. c. 22. *f. 5, 6.*

But if an offender is convicted in 12 months, the hundred shall not be liable; and therefore the action must not be brought till after one year: nor shall it be commenced but within two years. *f. 7, 8.*

Note; It is proper here to take notice of a very odd mistake in some of the books, relating to an act made in the 14 G. 2. c. 3. by reason of which act one author asserts, that the statute last recited is of little use, because that now by the said statute of 14 G. 2. *no corn can be exported*: and another says, that by the said statute of 14 G. 2. *no corn shall be exported after Dec. 15, 1741.* And the mistake is no other than this; that instead of *after*

Dec. 15. the statute says, *before* Dec. 15, 1741, none shall be exported; and the reason was, because at that time there was great scarcity of corn in the nation. To which may be added, that other books take no notice of either the one act or the other; perhaps from the above supposition, that the one act renders the other useless: by which it may seem, that the publishers of the new editions do not always bring down the alterations from the statutes themselves, but quote from one another.

IV. Importation of corn.

Poundage on importation.

1. When corn doth not exceed the following prices, the custom and poundage for corn imported shall be as follows: wheat not above 53s. 4d. a quarter, shall pay 16s. if above 53s. 4d. and not above 4l. it shall pay 8s. rye not above 40s. a quarter, shall pay 16s. barley and malt not above 32s. a quarter, shall pay 16s. buck wheat not above 32s. a quarter, shall pay 16s. oats not above 16s. a quarter, shall pay 5s. 4d. pease or beans not above 40s. a quarter, shall pay 16s. 22 & 23 C. 2. c. 13. f. 1.

But when the prices exceed these rates, then the duties payable before this act, shall only be paid. *id.* f. 2. That is to say, for every quarter of wheat imported 5s. 4d. of rye 4s. barley or malt 2s. 8d. buck wheat 2s. oats 1s. 4d. pease or beans 4s. 15 C. 2. c. 7. f. 3.

Price of corn how to be ascertained.

2. And that it may be known what price corn bears where such foreign corn is imported, the justices of the peace for the counties where foreign corn is imported, shall at every their quarter sessions give in charge to the grand jury to make inquiry and presentment upon their oaths, of the common market prices of the several sorts of middling *English* corn, as the same shall be commonly bought and sold in the county; which presentment shall be certified by the justices to the chief officer and collector of the customs at the port where the corn is imported, to be hung up in some publick place in the custom house: And the same shall be done in the city of London in October and April yearly, by the mayor, aldermen and justices there, by the oaths of two persons, neither of whom shall be corn chandler, meal man, factor, merchant, or other person interested in such corn so to be imported, but by substantial householders in Middlesex or Surrey, and each of them having a freehold estate of 20l. a year, or leasehold of 50l. a year, above reprises, and being skilful in the prices of corn. 5 G. 2. c. 12. 1 f. 2. c. 19.

Fraudulent importation.

3. And for preventing the fraudulent importation of foreign corn, no warrant shall be allowed for carrying forth
to

to sea, to any other port, any foreign corn after importation; and no person shall carry forth the same, or procure it to be shipped for that purpose, on pain of forfeiting the same and also 20s. for every bushel, and also the ship, with all her guns, tackle, and furniture; half to the king, and half to him who shall sue in any court of record. And the master and mariners, knowingly assisting therein, shall be imprisoned for three months. 5 G. 2. c. 12. s. 5.

Coroner.

CORONERS are ancient officers by the common law, so called because they deal principally with the pleas of the crown, and were of old time the principal conservators of the peace. 2 Haw. 42.

Concerning whom I shall shew,

I. Who may be a coroner.

II. How chosen.

III. His power and duty in taking an inquisition of death.

IV. His power and duty in other matters.

V. His fees.

VI. Punishment for not doing his duty.

I. Who may be a coroner.

1. Of ancient time this office was of great estimation; Dignity. for none could have it under the degree of a knight. 3 Ed. 1. c. 10. 4 Inst. 271.

2. And by the 14 Ed. 3. s. 1. c. 8. No coroner shall Estate. be chosen unless he have land in fee, sufficient in the same county, whereof he may answer to all manner of people.

II. How chosen.

1. The coroner (as of ancient time the sheriffs and To be chosen in conservators of the peace) shall be chosen in full county, the county court. that is, in the county court, by the commons of the same county. 28 Ed. 3. c. 6.

And this must be in pursuance of the king's writ for that purpose, issuing out of, and returnable into the chancery; and none but freeholders have a voice at such election, for they only are suitors to the county court. 2 *Haw.* 43, 44.

County to answer for him.

2. And being elected by the county, if he be insufficient, and not able to answer such fines and other duties in respect of his office, as he ought; the county, as his superior, shall answer for him. 2 *Inst.* 175.

Office not void by the king's death.

3. And being chosen by the county, his office continues, notwithstanding the demise of the king. 4 *Inst.* 271.

To be sworn.

4. And after he is chosen, he shall be sworn by the sheriff, for the due execution of his office. 2 *Hale's H.* 55.

Others not chosen by the county.

5. But in the statute of 28 *Ed.* 3. which enacts that they shall be chosen by the county, there is a saving to the king and other lords, who ought to make coroners, their franchises.

Chief justice.

6. The lord chief justice of the king's bench, by virtue of his office, is the chief coroner of *England*. 2 *H. H.* 53.

III. His power and duty in taking an inquisition of death.

Notice.

1. When it happens that any person comes to an unnatural death, the township shall give notice thereof to the coroner. Otherwise, if the body be interred before he come, the township shall be amerced. *Hale's Pl.* 170.

Burying without notice.

2. And by *Holt*, Ch. J. It is a matter indictable to bury a man that dies a violent death, before the coroner's inquest have sat upon him. 2 *Haw. Not.* 8.

Lying unburied.

3. And if the township shall suffer the body to lie till putrefaction, without sending for him, they shall be amerced. *Hale's Pl.* 270. 2 *Haw.* 48.

Precept to summon jury.

4. When notice is given to the coroner, he is to issue a precept to the constables of the four, five, or six next townships, to return a competent number of good and lawful men of their townships, to appear before him in such a place, to make an inquisition touching that matter. 4 *Ed.* 1. 2 *H. H.* 59. Or he may send his precept to the constable of the hundred. *Wood b.* 4. c. 1.

But the aforesaid statute being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty not mentioned in

in it, which was incident to his office before: Upon which ground, it hath been holden, that there is no necessity that it appear in a coroner's inquest, that it was taken by the oaths of persons of the next adjacent towns; but that it is sufficient to say, that it was taken by the oaths of lawful persons of the county; inasmuch as such inquisitions, being good before the statute, which is wholly declaratory, must needs be so still. But it seems that it ought to appear in every such inquisition, at what place, and by what jurors by name it was taken, and that such jurors were sworn. *2 Haw. 47.*

5. These are to be at least 12; and it is said, that all jury persons of the neighbouring towns, above the age of 12 years, are bound to attend at the taking the inquisition, unless they have a reasonable excuse to the contrary. *2 Inst. 148. 2 Haw. 54.*

6. If the constables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner: and the constables or jurors in default shall be amerced before the judges of assize. *2 H. H. 59.*

7. The jury appearing is to be sworn and charged by the coroner to enquire, upon the view of the body, how the party came by his death. *2 H. H. 60.*

8. For he can take indictments of death, only upon view of the body, and not otherwise, therefore if the body be interred before he come, he must dig it up. And this he may do lawfully within any convenient time, as in 14 days. *Hale's Pl. 170. 2 Haw. 48.*

9. If the body cannot be viewed, the coroner can do nothing; but the justices of the peace shall inquire thereof. *Hale's Pl. 170. 2 Haw. 48.*

10. The jury being sworn, and the body upon view, he shall inquire upon the oaths of them, in this manner, by the statute of 4 Ed. 1. *st. 2.* called the statute *de officio coronatoris*; viz.

If they know where the person was slain; whether it were in any house, field, bed, tavern, or company:

Who are culpable, either of the act, or of the force; and who were present, either men or women, and of what age soever they be, if they can speak, or have any discretion:

And how many soever be found culpable, they shall be taken and delivered to the sheriff, and shall be committed to the gaol;

And such as be found, and be not culpable, shall be attached until the coming of the judges of assize.

Where a person
slain is found in
the fields or
woods.

11. And, by the same statute, if it fortune any such man be slain, which is found in the fields, or in the woods, first it is to be enquired, whether he were slain in the same place or not :

And if he were brought and laid there, they shall do so much as they can to follow their steps that brought the body thither, whether he were brought upon a horse, or in a cart :

It shall be also enquired, if the dead person were known, or else a stranger, and where he lay the night before.

Wounds.

12. Also, by the same statute, all wounds ought to be viewed, the length, breadth, and deepness ; and with what weapons ; and in what part of the body the wound or hurt is ; and how many be culpable ; and how many wounds there be ; and who gave the wound.

Defendant's
evidence.

13. And they must hear evidence on all hands ; if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office. 2 H. H. 157.

To inquire of the
murderer's lands
and goods.

14. And by the aforesaid statute, if they be found culpable of the murder, the coroner shall immediately go to his house, and shall inquire what goods he hath, and what corn he hath in his graunge ; and if he be a freeman, they shall inquire how much land he hath, and what it is worth yearly, and further, what eorn he hath upon the ground : and likewise of his freehold, how much it is worth yearly, over and above the service due to the lord of the fee ; and the land shall remain in the king's hands, until the lords of the fee have made fine for it :

And when they have thus enquired upon every thing, they shall cause all the land, corn, and goods to be valued, in like manner as if they should be sold immediately ; and thereupon they shall be delivered to the whole township, which shall be answerable before the judges for all.

Persons drowned
or suddenly dead.

15. In like manner, by the said statute, it is to be inquired of them that be drowned, or suddenly dead, whether they were so drowned, or slain, or strangled by the sign of a cord tied streight about their necks, or about any of their members, or upon any other hurt found upon their bodies. And if they were not slain, then ought the coroner to attach the finders, and all other in the company.

Flight.

16. He shall also enquire, whether the persons found guilty, fled ; for which flight they forfeit goods and chattels. 2 Haw. 48, 53.

And it hath been formerly held, that if a person were slain, and upon the coroner's inquest on view of the body,

it were found that such a person fled, tho' the said person were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inquest is so solemn, that it is not traversable; also when the goods are once lawfully vested in the king, by that inquest the property of them cannot be devested. But this opinion seemeth harsh and unreasonable, that a man shall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inquest taken in his absence, without either hearing him, or giving him an opportunity of defending himself. 1 *Bac. Abr. Coroner. D.* 2 *Haw. 54.*

Also it is strongly holden in some books, that an inquest of self murder, found before a coroner, cannot be traversed: but the contrary opinion being also holden by books of as great authority, and seeming also to be more agreeable to the general tenor of the law in other cases, it seems to be the better opinion, that such inquest by being removed into the king's bench by certiorari, may be there traversed by the executor or administrator of the person deceased; or in case the coroner's inquest find him to have been a lunatick, by the king or the lord of the manor. 1 *Bac. Abr. Coron. D.* 2 *Haw. 54.*

17. And if any person be slain or murdered in the day Township amer-
time, and the murderer escape untaken, the township shall ced for an escape.
or amerced. 3 *H. 7. c. 1.*

18. Concerning horses, boats, carts, and the like, Deodands.
whereby any are slain, which properly are called deodands,
they also shall be valued, and delivered unto the towns as
before. 4 *Ed. 1. ft. 2.*

19. All which things must be inrolled in the rolls of the Coroner's rolls.
coroner. 4 *Ed. 1. ft. 2.*

20. And the sheriffs shall have counter rolls with the Sheriff's rolls.
coroner, of things belonging to their office. 3 *Ed. 1.*
c. 10.

21. But it is not necessary that the inquisition be Adjourning after
taken in the very same place where the body was viewed; view.
but they may adjourn to a place more convenient. 2
Haw. 48.

22. Immediately upon these things being inquired, the Burial.
bodies of such persons being dead, or slain, shall be buried.
4 *Ed. 1. ft. 2.*

23. By the 1 & 2 *P. & M. c. 13. f. 5.* Every coro- Certifying to the
ner, upon any inquisition before him found, whereby any jurors.
person shall be indicted for murder or manslaughter or as
accessary before the offence committed, shall put in writing
the effect of the evidence given to the jury before him, be-
ing material; and shall bind over the witnesses to the next
general

general gaol delivery to give evidence; and shall certify the evidence, the recognizance, and the inquisition or indictment before him taken and found, at or before the trial, on pain of being fined by the court.

By the exprefs words of which statute, he may inquire of *accessaries before the fact*; but he cannot enquire of accessaries *after the fact*. 2 *Haw.* 48.

Persons dying in
gaol.

24. He ought also to enquire of the death of all persons who die in prison; that it may be known, whether they died by violence, or any unreasonable hardships: for if a prisoner by the duress of the gaoler, comes to an untimely death, it is murder in the gaoler, and the law implies malice in respect of the cruelty. 3 *Inst.* 52, 91.

And this inquest upon prisoners ought to consist of a party jury, that is, six of the prisoners, and six of the next vill or parish, not prisoners. *Umfreville's Coroner* 212.

Inquisition
quashed.

25. If the inquisition shall be quashed in the court of king's bench, the coroner by leave of the court may take up the body again, and take a new inquisition. *E.* 5 *G. K.* and *Saunders.* Str. 167. *M.* 9 *G.* Case of the coroner of *Wenlock.* Str. 533.

And if a coroner appear to have been corrupt in taking an inquest, it seems that a *melius inquirendum* shall go to special commissioners, who shall proceed not on view, but upon testimony; and the coroner shall have nothing to do with such inquest: But where the inquest is quashed for want of form only, he shall take a new one in like manner, as if he had taken none before. 1 *Bac. Abr.* Coron. D.

IV. His power and duty in other matters.

Treasure trove.

1. He ought to inquire of treasure that is found; who were the finders, and likewise who is suspected thereof; and that may well be perceived, where one liveth riotously, haunting taverns, and hath done so of long time: hereupon he may be attached for this suspicion, by four, or six, or more pledges, if he may be found. 4 *Ed.* 1. *f.* 2.

Executing pro-
cesses.

2. Besides his judicial place, he hath also an authority ministerial as a sheriff; namely when there is just exception taken to the sheriff, judicial process shall be awarded to the coroner, for the execution of the king's writs: and in some special cases, the king's original writ shall be immediately directed to him. 4 *Inst.* 271.

3. He

3. He is bound to be present in the county court, to pronounce judgment of outlawry upon the exigent, after *quinto exactus*, at the fifth court, if the defendant doth not appear. *Wood b. 4. c. 1.*

4. He had anciently also a power in certain appeals, as of rape, and maim; and also in cases of abjuration for felony or other offences; which are now out of use.

V. His fees.

1. By the statute of 3 *H. 7. c. 1.* The coroner shall have for his fee, upon every inquisition taken upon the view of the body slain, 13s. 4d. of the goods and chattels of him that is the slayer and murderer, if he have any goods; and if not, he shall have for his said fee, of such amerciaments as shall fortune any township to be amerced for escape of such murderer. Fee of 13s. 4d.

2. Moreover by the 25 *G. 2. c. 29.* For every inquisition (not taken upon view of a body dying in gaol) he shall have 20s. and also 9d. for every mile he shall be compelled to travel from his usual place of abode to take such inquisition; to be paid by order of the justices in sessions, out of the county rates; for which order no fee shall be paid. *f. 1.* Fee of 20s. and 9d. a mile.

And for every inquisition taken on view of a body dying in prison, he shall be paid so much, not exceeding 20s. as the justices in sessions shall allow; to be paid in like manner. *f. 2.*

But no coroner of the king's household, and of the verge of the king's palaces; nor any coroner of the admiralty; or of the county palatine of *Durham*; nor of the city of *London* and borough of *Southwark*, nor any franchises belonging to the said city; nor of any city, town, or franchise, not contributing to the county rates, or within which such rates have not been usually assessed, shall be intitled to any benefit by this act; but they shall have such fees and salaries as they were allowed before this act, or as shall be allowed by the persons by whom they have been appointed. *f. 5.*

VI. His punishment for not doing his duty.

1. Coroners concealing felonies, or not doing their duty thro' favour to the misdoers, shall be imprisoned a year, and fined at the king's pleasure. 3 *Ed. 1. c. 9.* At the king's pleasure.

2. And by the 3 *H. 7. c. 1.* If any coroner be remiss, and make not inquisitions upon the view of the body dead, and

and certify the same to the gaol delivery, he shall forfeit to the king and hundred shillings.

3. And by the 25 G. 2. c. 29. If any coroner, not appointed by an annual election or nomination, or whose office is annexed to any other office, shall be convicted of extortion for taking more than his lawful fees, or of wilful neglect of his duty, or misdemeanor in his office; the court may adjudge him to be removed from his office; and thereupon, if he shall have been elected by the freeholders, a writ shall issue for the removing him, and electing another in his stead; and if he hath been appointed by the lord of any liberty or franchise, or in any other manner than by the freeholders, the person intitled to nomination, shall on notice of such judgment of removal, nominate another person in his stead. *f. 6.*

4. And he ought to execute his office in person, and not by deputy; for he is a judicial officer. *Wood b. 4. c. 1.* Otherwise it seemeth that he shall incur the afore-said penalties, for remissness or neglect of duty.

The coroner's precept to summon a jury.

Westmorland. { To the high constable of——— in the
said county.

THESE are in the name of our sovereign lord the king, to require you, immediately upon sight hereof to summon and warn 24 good and lawful men of the four next townships to——— in the said county, to be and appear before me A. C. gentleman, one of the coroners of the county aforesaid, at —— aforesaid in the said county, on the —— day of —— then and there to inquire of, do, and execute all such things as on his majesty's behalf shall be lawfully given them in charge, touching the death of A. D. And be you then there to certify what you shall have done in the premisses, and further to do and execute what in behalf of our said lord the king shall be then and there enjoined you. Given under my hand and seal the —— day of ——.

The jurors oath on the coroner's inquest.

YOU shall diligently inquire, and true presentment make, on the behalf of our sovereign lord the king, how and in what manner A. D. (or, a person unknown, as the case is) here lying dead, came to his death; and of such other matters relating to the same as shall be lawfully required of you, according to your evidence: So help you god.

After the foreman is sworn, the rest may be sworn, three or four together, as follows :

Such oath as A. F. the foreman of this inquest hath for his part taken, you and every of you shall well and truly observe and keep on your parts respectively : So help you god.

Witnesses oath.

THE evidence which you shall give to this inquest, on the behalf of our sovereign lord the king, touching the death of A. D. shall be the truth, the whole truth, and nothing but the truth : So help you god.

Inquisition of murder.

Westmorland. **A**N inquisition indented, taken at—— day of—— in the county of——aforesaid, the—— year of the reign of——before me A. C. gentleman, one of the coroners of our lord the king, for the county aforesaid, upon the view of the body of A. D. then and there lying dead, upon the oaths of A. B. C. D. E. F. &c. good and lawful men of——aforesaid, and of three other of the next towns, to wit, K. L. and M. in the said county, who being sworn and charged to inquire on the part of our said lord the king, when, where, how, and after what manner, the said A. D. came to his death, do say, upon their oath, that one A. M. late of——aforesaid, gentleman, not having god before his eyes, but being moved and seduced by the instigation of the devil, on the——day of——in the——year of——aforesaid, at the first hour in the night of the same day, with force and arms, at——in the county aforesaid, in and upon the aforesaid A. D. then and there being in the peace of god and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault ; and that the aforesaid A. M. then and there with a certain sword made of iron and steel, of the value of 5s. which he the said A. M. then and there held in his right hand, the aforesaid A. D. in and upon the left part of the belly of the said A. D. a little above the navel of the said A. D. then and there violently, feloniously, voluntarily, and of his malice forethought, struck and pierced, and gave to the said A. D. then and there with the sword aforesaid, in and upon the aforesaid left part of the belly of the said A. D. a little above the navel of the said A. D. one mortal wound of the breadth of half an inch, and of the depth of three

three inches, of which said mortal wound the aforesaid A. D. then and there instantly died; and so the said A. M. then and there feloniously killed and murdered the said A. D. against the peace of our said lord the king, his crown and dignity.

And the said jurors further say, upon their oath aforesaid, that A. A. of——yeoman, and B. A. of——yeoman, were feloniously present with drawn swords, at the time of the felony and murder aforesaid in form aforesaid committed, that is to say, on the said——day of——in the——year aforesaid, at——aforesaid, in the county aforesaid, at the first hour in the night of the said day, then and there comforting, abetting, and aiding the said A. M. to do and commit the felony and murder aforesaid in manner aforesaid, against the peace of our said lord the king, his crown and dignity.

And moreover, the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. A. A. and B. A. had not, nor any of them had, nor as yet have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors. [Or, And the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. at the time of the doing and committing of the felony and murder aforesaid, had goods and chattels, contained in the inventory to this inquisition annexed, which remain in the custody of B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year aforesaid, and at the place aforesaid.

A. C. Coroner.

A. B.

C. D.

E. F. &c. jurors.

An inquisition where one hangs himself.

——As above to——not having god before his eyes, but being seduced and moved by the insligation of the devil, at ——aforesaid, in a certain wood at——aforesaid standing and being, the said A. D. being then and there alone, with a certain hempen cord of the value of 3*d*. which he then and there had and held in his hands, and one end thereof then and there put about his neck, and the other end thereof tied about a bough of a certain oak tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice forethought, hanged and suffocated; and so the jurors aforesaid, upon their oath aforesaid say, that the said A. D.

then and there in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and of his malice forethought, himself killed, strangled, and murdered, against the peace, &c.

An inquisition where one drowns himself.

——at——aforesaid, in the county aforesaid, then and there being alone, in a common river there, called——himself voluntarily and feloniously drowned; And so the jurors aforesaid, upon their oath aforesaid say, that the aforesaid A. D. in manner and form aforesaid, then and there himself voluntarily and feloniously as a felon of himself killed and murdered; against the peace——.

An inquisition where one dies a natural death.

——that the said A. D. on the——day of——in the year aforesaid, at the parish and in the county aforesaid, to wit, in a certain place called——was found dead; that he had no marks of violence appearing on his body, and died by the visitation of god, in a natural way, and not otherwise. In witness, &c.

An inquisition upon one who dies in gaol.

——who say upon their oath, that the aforesaid A. D. on the day of the taking of this inquisition, being a prisoner in the gaol at——in the county aforesaid, then and there died of the visitation of god, and then and there in manner and form aforesaid came to his death, and not otherwise. In witness, &c.

An inquisition on one *non compos mentis*.

——who say upon their oath, that the aforesaid A. D. on the day and year aforesaid, and at the time of his death, to wit, from the——day of——to the time of his death, and at the time of his death aforesaid, was a lunatick, and a person of insane mind; and that the said A. D. being a lunatick and a person of insane mind as aforesaid, did on the——day of——come alone to a certain river, called——in the said county, and did then and there cast himself into the said river, and drowned himself in the water of the said river. And so the jurors aforesaid, upon their oath aforesaid say, that the aforesaid A. D. from the cause aforesaid, in manner and form aforesaid, came to his death, and not otherwise. In witness, &c.

An inquisition on one for cutting his throat.

——by the instigation of the devil, at——aforesaid in the county aforesaid, in and upon himself, then and there being in the peace of god and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault: and that the aforesaid A. D. then and there with a certain knife, of the value of one penny, which he the said A. D. then and there held in his right hand, himself upon his throat then and there feloniously, voluntarily, and of his malice forethought did strike, and gave to himself then and there with the knife aforesaid, upon his throat aforesaid one mortal wound of the breadth of four inches, and the depth of one inch, of which said mortal wound the said A. D. at——aforesaid in the county aforesaid languished, and languishing lived, from the said——day of——in the——year aforesaid, to the——day of——and that the said A. D. on the——day of——aforesaid, in the——year aforesaid, at——aforesaid, in the county aforesaid, of that mortal wound died. And so the jurors aforesaid, &c.

For killing another in his own defence.

——upon their oaths say, that A. K. late of——gentleman, at——aforesaid in the said county, on the——day of——in the——year of——in the peace of god and of our said lord the king then being, A. M. late of——in the county of——at the hour of——in the afternoon of the same day, did come, and upon him the said A. K. then and there of his malice forethought did make an assault, and him the said A. K. did then and there endeavour to beat and kill, by continuing the assault aforesaid, from the house of one W. H. in——aforesaid to a certain place called——in the county aforesaid, and the said A. K. seeing that the said A. M. was so maliciously disposed, to a certain wall in the said place, called——did flee, and from thence for fear of death could not escape, and so the said A. K. himself, in preservation of his life, against the said A. M. continued to defend, and in his own defence him the said A. M. upon the right part of the breast of him the said A. M. with a certain sword of the price of one shilling, which the said A. K. then and there held in his right hand, did strike, then and there giving to the same A. M. one mortal wound, of the breadth of one inch and of the depth of three inches, of which said mortal wound the said A. M. at——aforesaid in the county aforesaid languished, and languishing lived from
the

the said ——— day of ——— to the ——— day of ——— from thence next ensuing, and that the said A. M. on the said ——— day of ——— in the ——— year aforesaid, at ——— aforesaid in the said county, of that mortal wound died; And so the said A. K. did then and there kill him the said A. M. in his own defence.

An inquisition where the murderer is unknown.

———The same as before, only say, ——— that a certain person unknown, &c. and add ——— And the said jurors upon their oath aforesaid further say, that the said person unknown, after he had committed the said felony and murder in manner aforesaid, did fly away: Against the peace, &c.

Cottage.

A Cottage (Sax. Cote) is a little house for habitation, without any land belonging to it. *Wood b. 3. c. 3.*

By the 31 El. c. 7. No person shall build any cottage for habitation, nor convert any building to be used as a cottage for habitation, unless he lay to the same four acres of ground at the least, according to the statute or ordinance de terris mensurandis, being his own freehold or inheritance lying near to the said cottage, to be continually occupied and manured therewith, so long as the same cottage shall be inhabited; on pain of 10l. to the king. *l. 1.*

And every person who shall uphold and continue any such cottage, to be erected or converted for habitation, whereunto four acres shall not be laid to be occupied therewith, shall forfeit to the king 40s. for every month. *l. 2.*

And there shall not be any inmate, or more families than one, dwelling in any one cottage; on pain that the owner or occupier shall forfeit to the lord of the leet 10s. a month, who on presentment may levy the same by distress, or sue for it in any court of record. *l. 3.*

And the justices of assize, justices of the peace in sessions, and every lord within his leet, and no others, may hear and determine all offences against this act, by indictment or by presentment, or information, and award execution by fieri facias, elegit, capias, or otherwise. *l. 4.*

But this act shall not extend to any cottage in any city, town corporate, or ancient borough, or market town; nor to any cottages for workmen only, in any mineral works, coal mines,

quarries, or delfs of stone or slate, or in making brick, tile, lime, or coals, so as they be not above one mile distant from the place of working. §. 5.

Also this shall not extend to any cottage within a mile of the sea, or on the side of a navigable river where the admiral ought to have jurisdiction, so long as no person shall inhabit therein, but a sailor, or man of manual occupation for furnishing any ship or vessel; nor to any cottage to be made in any forest, chase, warren, or park, so long as no other person shall therein inhabit, but an under keeper or warrener; nor to any cottage heretofore made, so long as no other person shall therein inhabit, but a common herdman or shepherd, for keeping the cattle or sheep of the town, or a poor, lame, sick, aged, or impotent person; nor to any cottage to be made, which for any just respect, on complaint to the assizes or sessions, shall by their order be decreed to continue for habitation, so long only as by such decree shall be limited. §. 6.

And by the 43 El. c. 2. The churchwardens and overseers, by consent of the lord of the manor, may erect cottages on the wastes and commons, for the habitation of the poor, but for no other purpose. §. 5.

No person shall build any cottage for habitation] An indictment for erecting a cottage contrary to the statute, was quashed; because it was not said that any inhabited it: for if it was not inhabited, it was no offence. 1 Vent. 107.

According to the statute or ordinance de terris mensurandis] That is, after 16 $\frac{1}{2}$ foot to the pole. 2 Inst. 737.

Being his own freehold or inheritance] Therefore neither grounds holden by copy, or for life or lives, or for any number of years will serve: and it must be freehold, either in fee simple, or fee tail. 2 Inst. 737.

Justices of assize, justices of the peace in sessions, and every lord within his leet] So that there is a concurrent power in every of these three; and the judgment of such one of them as doth first inquire of, hear, and determine the same, shall stand. 2 Inst. 739.

Nor to any cottage heretofore made] That is, erected before the making of this act.

Finally, Lord Coke observing upon this act of the 31 El. says, The inconveniences that grow by unlawful cottages against this statute are great; being nests to hatch idleness, the mother of pickings, thieveries, stealing of wood, and the like; tending also to the prejudice of lawful com-

moners,

moners, for that new erected cottages within the memory of man, tho' they have four acres of ground, or more laid to them, according to this act, ought not to common in the wastes of the lord; but the greatest inconvenience of all is, the ill breeding and educating of youth; which inconveniences may be easily helped and remedied, by the provisions of this excellent law, if lords of leets and their stewards would look to the execution of this act, which (he says) he holds to be the readiest means; for albeit the cottage erected, or converted, cannot by any provision in this statute be demolished, or pulled down, yet the execution of the penalty of this act will make it uninhabitable, and work the desired effect. And they may also be amerced, for wrongful commoning, in the court baron. 2 *Infl.* 740.

Counterfeit. See Coin, Cheat, Forgery.

County court.

1. **A**NCIENTLY, the *comites*, *counts*, or *earls*, had ^{County.} the government of the counties; and afterwards the *vicecomites* or *sheriffs*. And the *county* seemeth to be nothing else, but the district of the *comes* or *count*. *Shire* is a Saxon word, from *seyran*, to share or divide, for that the shires or counties are divided by certain metes and bounds from each other. And the *sheriff*, in Saxon *scyre-gerefa* is the *reve*, *grave*, or governor of the *shire*; wherein he hath great power, being therein the chief officer under the king.

2. The sheriff holdeth in his county two courts; the ^{County court.} *torn*, and the *county court*: The *torn* is the king's court of record, for criminal causes, and for redressing of common grievances within the county; the *county court* is not a court of record, but only a court baron, for civil causes, and this is the court of the sheriff himself.

3. By the 2 & 3 *Ed.* 6. c. 25. No county court shall be longer deferred than one month from court to court, so that the county court shall be kept every month, and not otherwise. ^{When to be holden.}

And this is to be accounted 28 days to the month, and not according to the month of the kalendar. 2 *Infl.* 71.

4. It may be kept at any place within the county, unless restrained by statute. *Wood b.* 4. c. 1. ^{Where to be kept.}

How far the
sheriff is judge.

5. The suitors, that is, the freeholders, are the judges in this court; except that in re-disseisin, by the statute of *Merton*, the sheriff is judge. And by the statutes concerning parliamentary elections, he is judge at the election of knights; for he must make a true return at his peril. *Barl. County Court.*

Of what sum
this court hath
cognizance.

6. This court shall hold pleas betwixt party and party, where the debt or damage is under 40 s. 4 *Inst.* 266.

But in a *replevin*, the sum may be above 40 s. 4 *Inst.* 266.

Of what offences
this court hath
cognizance.

7. Also it hath not cognizance of trespass *vi & armis*, because a fine is thereby due to the king, which it cannot impose. 4 *Inst.* 266.

One plaint for
one trespass or
contract.

8. And by the 11 *H. 7. c. 15.* No plaint shall be entered in the county court, but where the plaintiff or his attorney is present; and the plaintiff shall find pledges to pursue his plaint; and he shall have but one plaint for one trespass or contract; on pain of 40 s. half to the king, and half to the prosecutor. And one justice may examine the sheriff or other officer, making default; and shall, within a quarter of a year, certify the examination into the exchequer.

But as to the pledges abovementioned, they are now disused in this court; and were formerly used only in cases where the plaintiff lived out of the county. *Greenw. 11. Read. County C.*

Writ of justices.

9. But by virtue of a writ of *justicies*, the court may hold plea of trespass *vi & armis*, and of any sum, or of all actions personal above 40 s. For this writ is in the nature of a commission to the sheriff, and is *vicontiel*, that is, belongs to the sheriff, and is triable in the county court, and is not returnable. 4 *Inst.* 266.

Who shall act as
attorney in this
court.

10. By the 12 *G. 2. c. 13. f. 7.* If any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceedings in the county court, who shall not be admitted attorney or solicitor according to the act of 2 *G. 2. c. 23.* he shall forfeit 20 l. with costs, to him who shall sue in any court of record.

Summons.

11. The plaintiff in this court first takes out a summons, returnable at the next county court; and if the defendant do not appear, an attachment or *distringas* is to be made out: but if the defendant appears, the plaintiff is to file his declaration, shewing his cause of action, or matter of complaint, in what manner the action accrued, at what time and place the wrong was done, and the damage he hath sustained. *Greenw. 11. Read. County C.*

12. If the defendant doth appear, and the next court after gives a rule to declare, and the plaintiff doth not file his declaration within the time, he may be nonsuited. *id.* Declaration.

13. When the plaintiff hath declared, he must continue his suit from court day to court day, otherwise the defendant may take advantage of it; and this is called a continuance, being an adjourning of the suit from time to time, to keep it on foot. *id.* Continuance.

14. The rule, or *dies datus*, is when farther day is given to the plaintiff to declare, or to the defendant to plead; and the time given is usually to the next court day, but upon occasion may be enlarged. *id.* Dies datus.

15. The next court after filing the declaration, and im- parlance given, the defendant is to put in his answer or plea, and if the plaintiff join issue, they may proceed to trial the next court day, if they proceed not farther by replication, rejoinder, surrejoinder, and the like. *id.* Answer.

16. But if freehold is pleaded by the defendant, this court can proceed no further, for freehold shall never be tried without writ; therefore the cause must be removed: as when a defendant avoweth for damage feasant, and the plaintiff justifieth by reason of common of pasture. *Wood b. 4. c. 1.* Plea of freehold

17. Where a verdict is given for the plaintiff, and judgment entered thereupon, a *fiery facias* may be awarded against the defendant's goods, which may be taken by virtue thereof, and appraised and sold, to satisfy the plaintiff; but if the defendant hath no goods whereupon to levy, the plaintiff remains without remedy in this court, for it being no court of record, no *capias* lies there; but an action may be brought at common law upon the judgment entered. *Greenw. 22. Read. County C.* Judgment and distress.

18. Causes are removed out of this court, by a writ of *recordare*, which issues out of the chancery, directed to the sheriff, commanding him to send the plaint that is before him in his county court (without writ of *justicies*) into the court of king's bench, or common pleas, to the end the cause may be there determined. And the sheriff is hereupon to summon the other party to be in that court, (into which the plaint is to be sent) at a day certain. And of all this he is to make a certificate under his own seal, and the seals of four suitors of the same court. *Read. County C.* Removal by recordare.

19. Causes are also removed by *pone*, which differs in nothing from a *recordare*, but that it removes such suits as are before the sheriff by writ of *justicies*, and a *recordare* is to remove the suit that is by plaint only, without writ. *id.* Removal by pone.

Removal after
discontinuance.

20. And altho' the plea be discontinued in the county, yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench, and it shall be good, and he shall declare upon the same. *id.*

Outlawry pronounced.

21. In this court, after the *quinto exactus*, the coroner gives judgment of outlawry. 4 *Inst.* 266.

Hundred court.

22. Out of the county court is derived the hundred court, for the ease of the subject; and it hath like jurisdiction as the county court, and may be held every three weeks. 2 *Inst.* 71.

County rate.

Several rates
thrown into one
general county
rate.

1. **T**HE several rates hereafter following, in order to avoid the inconveniences of separate collections, shall for the future be levied and raised by one general county rate.

That is to say,

(1) For repairing county bridges, and highways thereto adjoining, and salaries for the surveyors of bridges; as directed by the 22 *H. 8. c. 5.* and 1 *An. st. 1. c. 18.*

(2) For building and repairing county gaols; by 11 & 12 *W. c. 19.*

(3) For the master of the house of correction his salary, and relieving the weak and sick in his custody; by the 7 *J. c. 4.*

(4) For relief of the prisoners in the king's bench and marshalsea prisons, and of poor hospitals in the county, and of those that shall sustain losses by fire, water, the sea, or other casualties, and other charitable purposes for relief of the poor; by the 43 *El. c. 2.*

(5) For relief of prisoners in the county gaol; by 14 *El. c. 5.*

(6) For setting prisoners on work; by the 19 *C. 2. c. 4.*

All which said six distinct rates (and that for vagrants by the 12 *An.* now repealed) are incorporated into one general county rate, by the 12 *G. 2. c. 29.* And by the said statute and other subsequent statutes, these other following charges are likewise directed to be paid out of the said general county rate; to wit,

(7) The treasurer's salary; by the 12 *G. 2. c. 29.*

(8) Charges attending the removal of any the said general county rates by *certiorari*; by the 12 *G. 2. c. 29.*

(9) Money

(9) Money for purchasing lands at the ends of county bridges; by the 14 G. 2. c. 33.

(10) Charges of building or repairing houses of correction, and for fitting up and furnishing the same, and employing the persons sent thither; by the 17 G. 2. c. 5. *f. 33.*

(11) Charges of apprehending, conveying, and maintaining rogues and vagabonds; by the 17 G. 2. c. 5.

(12) Charges of the soldiers carriages, over and above the officers pay for the same, by the several yearly acts against mutiny and desertion, and by the militia act of the 2 G. 3. c. 20.

(13) The coroners fee of 9 d. a mile for travelling to take an inquisition, and 20 s. for taking it; by the 25 G. 2. c. 29.

(14) Charges of carrying persons to the gaol, or house of correction; by the 27 G. 2. c. 3.

(15) Charges of prosecuting and convicting felons; by the 25 G. 2. c. 36. and 27 G. 2. c. 3.

(16) Charges of prosecuting and convicting persons plundering shipwrecked goods; by the 26 G. 2. c. 19.

(17) Charges of maintaining the militia mens families; by the militia act of the 2 G. 3. c. 20.

(18) Charges of bringing insolvent debtors to the assizes, in order to their discharge, if themselves are not able to pay; by the 32 G. 2. c. 28.

To which may be added these following, by former statutes; *viz.*

(19) By the 6 G. c. 23. The charges of transporting felons are directed to be paid by the treasurer out of the county stock; which is now the same in effect, as to charge it upon the general county rate; since there can be no county stock in the treasurer's hands but that.

(20) Charges of carrying parish apprentices, bound to the sea service, to the port to which the master belongeth; by the 2 & 3 An. c. 6.

2. And that the same may be collected with as much ease, and as little expence as possible, the justices at their general or quarter sessions, or the greater part of them, shall have power to make one general rate to answer all the purposes aforesaid. 12 G. 2. c. 29. *f. 1.*

Which rate shall be assessed in such proportions in every parish or place, *as any of the rates by the said several former acts have been usually assessed.* *id.*

By which last words reference being made to the former acts, as to the manner of proportioning the rate, it is proper to insert here, how the case stands upon the said former acts, as to such laying of the assessment; and it is thus:

(1) By

Sessions to lay
the rate.

(1) By the abovementioned act of the 22 *H. 8.* (in regard to *bridges*) the justices were to rate every inhabitant within their jurisdiction, in such reasonable sum, as they should think convenient. And by the 1 *An. st. 1. c. 18.* Every town, parish, or place was to be assessed, as they usually had been assessed towards the repair of bridges.

(2) By the 14 *El. c. 5.* (for *relief of prisoners*) the justices were to rate every parish at such reasonable sums as they should think convenient.

(3) By the 44 *El. c. 2.* (for *hospitals and the marshalsea*) the same was to be rateably assessed upon every parish.

(4) By the 7 *J. c. 4.* (for *the master of the house of correction his salary*) the same was to be rated, as for hospitals and the marshalsea, by the 43 *El. c. 2.*

(5) By the 19 *C. 2. c. 4.* (for *setting prisoners on work*) to be raised as other county charges.

(6) By the 11 & 12 *W. c. 19.* (for repairing *gaols*) to be assessed by the justices in equal proportions, on every hundred, ward, or other division.

(7) And for *vagrants* (by the 12 *An.* now repealed) the money was to be raised as for bridges and gaols.

So that upon the whole here seems to be intended an equal, porportionable rate, upon every division.

Places exempted
from part of the
rate.

3. And where any person, liberty, division, or place hath usually contributed, or is liable to pay, only to one or more of, and not to all the rates hereby intended to be raised and thrown into one general rate; the justices at their general or quarter sessions may order and ascertain, what proportion thereof shall be assessed on, and paid by such person, liberty, division, or place. 12 *G. 2. c. 29. f. 5.*

As for instance, where by the statute of 22 *H. 8. c. 5.* towns corporate are charged for the repairing of bridges within their respective liberties; and the counties, for the bridges out of such liberties; in such case, a town corporate ought not to be charged towards the bridges in the county at large; and consequently ought to have an abatement in the rate charged upon them, in such proportion as the expence of bridges is to the whole expence of the several articles charged upon the said general county rate; as if the expence of bridges be a tenth part of the whole expence chargeable upon the county rate, then such town corporate shall have an abatement of one shilling for every ten, which it would otherwise be charged with in such rate.

Places exempted
from the
whole rate.

4. And by the 13 *G. 2. c. 18. f. 7.* Where any liberties or franchises have commissions within themselves, and are not

not subject to the county justices, and do not, nor did before the 12 G. 2. contribute to the county rates; the justices within such liberties may exercise the same powers within their liberties, as justices in their counties.

5. Which said rates the high constables shall, at such times as the said justices by their order in sessions shall direct, demand of the churchwardens and overseers; which demand shall be made in writing (A) and given to them, or any of them, or left at their dwelling houses, or affixed on the church doors, by the said high constables. 12 G. 2. c. 29. f. 2. High constable to make demand.

6. Whereupon the said churchwardens and overseers shall, in 30 days after such demand made, out of the money collected for relief of the poor, pay the sums so assessed on each parish or place. 12 G. 2. c. 29. f. 2. Overseers to pay.

7. And if the churchwardens or overseers, or any of them, shall neglect or refuse so to pay, the high constable shall levy the same by distress and sale of the goods of such churchwardens or overseers so refusing or neglecting, by warrant of two or more justices residing in or near such parish or place. 12 G. 2. c. 29. f. 2. To be levied by distress.

8. And the receipt of such high constable shall be a full discharge to the churchwardens and overseers, or other person paying the same. 12 G. 2. c. 29. f. 2. High constable's receipt.

9. Where there is no poor rate, the justices, in their general or quarter sessions, shall by their order direct the sum assessed on such parish, township, or place, to be rated and levied by the petty constable, or other peace officer, as money for relief of the poor is by law to be rated or levied: Which sum so rated and levied shall be paid by him to the high constable, and shall be demanded of, paid by, or levied on such petty constable, in the same manner as before of the churchwardens and overseers. And if any petty constable shall pay such sum before he hath collected it, he may afterwards rate and levy the same, or may be allowed and reimbursed the same, out of any constable's or other rate, which the justices in their sessions shall order and direct. 12 G. 2. c. 29. f. 3. Case where there is no poor rate.

As money for relief of the poor is to be rated or levied] That is to say, by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes, coal mines, or saleable underwoods. 43 El. c. 2. f. 1.

10. And whereas it will be inconvenient to many towns, parishes, and places, in the counties of York, Derby, Durham, Lancaster, Chester, Westmorland, Cumberland, and Northumberland, that the said rates should be paid out of the poor Northern counties.

poor rate, the justices at their general or quarter sessions, *if they shall think convenient*, may order the sum assessed on any such town, parish, or place, to be paid by and levied on the petty constable (B) in such manner as is above directed, in cases where no rate is made for the poor. 12 G. 2. c. 29. s. 4.

If they shall think convenient] By which words, the justices in those counties may order the rate to be paid by either of the two methods before mentioned, according to their discretions; that is to say, either by the churchwardens and overseers out of the poor rate; or by the petty constables by an assessment after the manner of the poor rate. And the reason of this clause seems to be, because some parishes in the northern counties being very large, and for that reason subdivided into several townships with regard to the poor, it may happen that some townships in the same parish may be high rated, and others low rated, towards the relief of their poor; therefore if a general sum for the county rate upon the whole parish, were to be charged upon all the inhabitants, in proportion to their poor rate, it would lay the burden very unequally. To remedy which, the justices by this clause may charge separately such sum as they shall think reasonable upon each subdivision or constablewick, in order to lay the same equally throughout the parish: and if any township shall be aggrieved thereby, they may appeal as hereafter is directed, or remove it by *certiorari*.

High constable
to pay to the
treasurer.

11. The said high constables, at or before the next sessions respectively after they have received the money, shall pay the same to the treasurer; and the money so paid, shall be deemed the publick stock. 12 G. 2. c. 29. s. 6.

Treasurer's
receipt.

12. And the treasurer's receipt shall be a sufficient discharge to the high constable. 12 G. 2. c. 29. s. 9.

High constable
to account.

13. And the said high constables shall deliver in a true account on oath (if required) of the money by them received, before the said justices at their general or quarter sessions: And if any such high constable shall neglect or refuse to demand or levy as aforesaid, or to account, the said justices at their general or quarter sessions may commit him to the common gaol, until he shall have caused such rates to be demanded and levied, and shall have rendered a true account. And if it shall appear by such account, that any sum is remaining in his hands, and he shall not pay over the same to the treasurer, they may commit him till he pay the same. 12 G. 2. c. 29. s. 8.

14. And the justices, at their general or quarter sessions, may oblige by their order, the petty constables or any other person impowered to levy, collect, or receive any sum for the purposes aforesaid, and who have any sum in their hands, to account and pay over the same, in like manner as the high constables. 12 G. 2. c. 29. *f. 17.*

Petty constables
and others to
account.

15. And the treasurer shall pay so much of the money in his hands, to such persons, as the justices in sessions shall by their order from time to time appoint, for the uses and purposes of the said above mentioned acts, and for any other uses and purposes to which the publick stock of any county, city, division or liberty, is or shall be applicable. 12 G. 2. c. 29. *f. 6.*

Treasurer's dis-
bursements.

16. And the treasurer shall keep a book of entries, of the sums by him received and paid; and shall deliver in a true account on oath if required, of his receipts and disbursements, to the justices at every general or quarter sessions, and also the proper vouchers for the same, to be kept amongst the records of the sessions. 12 G. 2. c. 29. *f. 7, 8.*

Treasurer's
account.

17. And the discharge of the said justices, by their order at their general or quarter sessions, shall be a sufficient discharge to the treasurer. 12 G. 2. c. 29. *f. 9.*

Sessions order a
discharge to the
treasurer.

18. And no new rate shall be made, until it appear by the treasurer's accounts, or otherwise, that three fourths of the money collected have been expended for the purposes aforesaid. 12 G. 2. c. 29. *f. 10.*

New rate when
to be made.

19. If the churchwardens and overseers of any parish or place, shall think such parish or place is over rated, they may appeal to the next general or quarter sessions, against such part of the rate only as may affect such parishes or places: but such rate, upon the appeal, shall not be quashed in regard to any other parishes or places. 12 G. 2. c. 29. *f. 12.*

Appeal.

20. No *certiorari* to remove any rates, or any orders or other proceedings of the sessions touching such rates, shall be granted but upon motion the first week of the next term after the time for appealing from such rates or orders is expired; and on making it appear to the court by affidavit or otherwise, that the merits of the question on such appeal or orders, will by such removal come properly in judgment. And no such *certiorari* shall be allowed, until sufficient security be given to the treasurer, in the sum of 100 l. to prosecute the *certiorari* with effect, and to pay the costs if the rates or orders shall be confirmed. Nor shall

Certiorari.

shall any such rates, orders, or proceedings be quashed for want of form only. 12 G. 2. c. 29. s. 21.

And no action shall be commenced against any person who shall have collected or received any money, or any rate which shall be quashed on a *certiorari* or otherwise, for any money collected or received on such rate before the *certiorari* was brought; but the persons who have paid on such rate more than they ought to have paid, shall be repaid, or have the same allowed in the next rate. 12 G. 2. c. 29. s. 18.

A. High constable's warrant to levy the rate.

Westmorland, { To the churchwardens and overseers of
Kendal ward. { the poor of the township [or parish] of
 { —in the said county.

B*Y virtue of an order of his majesty's justices of the peace in and for the said county, in their general quarter sessions assembled, you are hereby required in thirty days time from your receipt of this precept, or otherwise having had due notice thereof, to pay to me, out of the money by you collected or to be collected for the 'relief of the poor, the sum of——— being the proportion of your said township [or parish] for and towards the general county rate, for the repairing of bridges; repairing of the gaol, and for the relief of prisoners therein; and for the relief of the prisoners in the king's bench and marshalsea prisons; repairing and furnishing the house of correction, with the salary of the keeper thereof; the treasurer's salary; the coroner's fees; the charges concerning vagrants, soldiers carriages, convicting and transporting felons, and other county charges. And herein you are not to fail, on the peril that shall ensue thereof. Given under my hand at Lathhead in the said county, the——day of——.*

Tho. Dennison, *High constable.*

Or, in the northern counties abovementioned, the justices, if they think proper, instead of ordering the money to be paid by the churchwardens and overseers, may order it to be paid by the petty constables; and then the high constable's precept to the petty constables may be thus;

Westmorland,

Westmorland, { To the constables of——in the said
Kendal ward. { county.

BY virtue of an order from his majesty's justices of the peace in and for the said county, in their general quarter sessions assembled, you are hereby required to raise the sum of —— within your constablewick, for which you are to make an equal rate within your said constablewick, and to levy the same, in such manner as money for the relief of the poor is by law to be rated or levied: which said sum you are to pay unto me, in thirty days time from your receipt of this precept, or otherwise having had due notice thereof; the same being the proportion of your said constablewick, for and towards the general county rate, for the repairing of bridges——

And so repeat the several particulars as in the last precedent; and that for this reason, that the people may know what it is they pay their money for.

Court Leet. See **Leet**.

Court of sessions. See **Sessions**.

Curriers. See **Leather**.

Customs.

THE laws relating to the customs, so far as justices of the peace, constables, and other such officers, are concerned therein, being considerably connected with the laws of excise, it is thought proper to refer this subject to the title **Excise**, where the whole will be more clearly comprehended under one view.

Custos rotulorum.

BY the 37 H. 8. c. 1. (which was altered by the 3 & 4 Ed. 6. c. 1. but restored by 1 W. c. 21.) No person shall be appointed to the office of *custos rotulorum*, but such as shall have a bill signed with the king's hand for the same;

same; which bill signed shall be a sufficient warrant to the lord chancellor, to make a commission, assigning and authorizing thereby the same person to be *custos rotulorum*, until the king hath by another bill with his own hand appointed one other person to have the same office, by himself, or his sufficient deputy, learned in the laws, and meet and able to supply the said office.

In pursuance whereof, the last clause in the commission of the peace is generally to this effect: “ Lastly, we
“ have assigned you the aforefaid——keeper of the
“ rolls of our peace in our said county, and therefore
“ you shall cause to be brought before you and your
“ said fellows, at the days and places aforefaid, the
“ writs, precepts, processes, and indictments aforefaid,
“ that they may be inspected, and by a due course deter-
“ mined, as is aforefaid.”

Cutting out tongues. See **Maim**.

Cyder. See **Excise**.

Damage feasant. See **Distress**.

Debtors.

HOW prisoners for debt shall be demeaned. See title **Gaol**.

Insolvent Debtors brought to the assizes, in order to be discharged, shall pay for their bringing thither, not exceeding 12d. a mile; and if they are not able to pay, then the same shall be paid by the treasurer, out of the county stock. 32 G. 2. c. 28. s. 15.

The last insolvent act is that of the 5 G. 3. c. 41. for relief of persons imprisoned for debt, on or before Jan. 1. 1765. On which act no discharges are to be obtained after Aug. 1. 1767.

Deer. See **Game**.

Defamation. See **Slander**.

Demurrer,

Demurrer.

A *Demurrer* (from *demorari*) signifies an abiding in point of law, upon which the defendant joins issue, allowing the fact to be true as laid in the indictment. *Wood* b. 4. c. 5.

In criminal cases not capital, if the defendant demur to an indictment, the court will not give judgment against him to answer over, but final judgment. 2 *Haw.* 334.

But regularly in all cases of felony, where a man pleads a special matter, tho' he conclude his plea with not guilty to the felony, or do not conclude it so, yet if his plea be tried, or found, or ruled against him, he shall be put to his plea of not guilty, and be tried for the felony; for tho' a man shall lose his land in some cases, for mispleading, yet he shall not lose his life for mispleading. 2 *H. H.* 257.

Deodand.

1. **D**EODAND is, when any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any person. 3 *Inst.* 57.

2. This, altho' it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder: and the unhappy instrument or occasion of such death is called a deodand (*deodandum*), and forfeited to the king, and was anciently paid into the hands of the king's almoner, to be applied to pious uses for the soul of the deceased. Also all such weapons, whereby one man kills another, are forfeited. 3 *Inst.* 57. 1 *Haw.* 66. *Fojl.* 265.

3. This forfeiture is still part of the casual revenue of crown, unless where lords of franchises are intitled to it by grant. For no man can prescribe to it, or to the goods of self-murderers or other felons, or of outlaws, happening within his royalty. *Fojl.* 265.

4. It seems clearly settled, contrary to the former opinions, that a horse, or the like, killing an *infant* within the age of discretion, is as much forfeited as if he were of age. 1 *Haw.* 66.

5. Also, it was anciently holden, that things *fixed to a freehold*, as the wheel of a mill, or a bell hanging in the steeple, may be deodands; but by the latter resolutions they cannot, unless they were severed before the accident happened. 1 *Haw.* 66.

6. It is agreed by all, that a *ship* in salt water, from which a man falls and is drowned, is not forfeited, because persons at sea are continually exposed to so many perils, that the law imputes not such misfortunes to the ship. Also it seems clear, that when a man riding on a horse over a river, is drowned thro' the violence of the stream, the horse is not forfeited, because not that, but the water caused his death. But it is said, that a ship, by a fall from which a man is drowned in the fresh water, shall be forfeited, but not the merchandize therein; because they no way contribute to his death. And by the same reason it seems that if a man riding on the shafts of a waggon, fall to the ground and break his neck, the horses and waggon, only are forfeited, and not the loading, because it no way contributed to his death; for which cause, where a thing not in motion causes a man's death, that part thereof only, which is the immediate cause, is forfeited. As where one climbing upon the wheel of a cart, while it stands still, falls from it, and dies of the fall, the wheel only is forfeited: But if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater; and it is a general rule, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also. 1 *Haw.* 66.

7. Thus a cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon, was driven upon an high bank and overturned, and threw a person that was in the cart, just before the wheels of the waggon, and the waggon ran over him and killed him; it was resolved in this case, that the cart, waggon, loading, and all the horses were deodands, because they all moved to the death. 1 *Salk.* 220.

8. If a weight of earth fall upon a worker in a mine, and kill; the weight of the earth is forfeit, and not the whole mine. 1 *H. H.* 420.

9. In all these cases, if the party wounded die not of his wound, within a year and a day after he received it, there shall be nothing forfeited, for the law doth not look on such a wound as the cause of a man's death, after which he lives so long: But if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the mean time. 1 *Haw.* 67.

10. However nothing can be forfeited as a deodand, nor seized as such, till it be found by the coroner's inquest to have caused a man's death; but after such inquisition, the sheriff is answerable for the value of it, and may levy the same on the town where it fell, and therefore the inquest ought to find the value of it. 1 *Haw.* 67.

11. And if the coroner omits his duty in this case, the inquisition may be made by the commissioners of gaol delivery, oyer and terminer, or of the peace. 1 *H. H.* 419.

12. After all, as this forfeiture seemeth to have been originally founded, rather in the superstition of an age of ignorance, than in the principles of sound reason and policy, it hath not of late years met with great countenance in *Westminster-hall*. And when juries have taken upon them to use a judgment of discretion, not strictly within their province, for reducing the quantum of the forfeiture, the court of king's bench have refused to interpose in favour of the crown or lord of the franchise. In the case of *K. and Rolfe*, coroner of *Kent*, *H. 5 G. 2.* the coroner's inquest found, that a man sitting on his waggon accidentally fell to the ground, and that the horses drawing the waggon forward, one of the fore wheels crushed his head, of which he instantly died, and then concluded that only the wheel, on which they set a small value, moved to his death. A motion was made, in behalf of *Mr. Mompeffon*, lord of the franchise, for quashing this inquisition, upon affidavits tending to shew, that the cart and horses were equally instrumental, which indeed the finding of the jury did sufficiently imply. But the court was very clear, that neither this court nor the coroner can oblige the jury to conclude otherwise than they have done, and would not suffer the affidavits for quashing the inquisition to be read. A like case came on, *M. 29 G. 2. K.* and *Drew*, coroner of *Middlesex*. The coroner's jury,

upon view of the body of a person killed by the like accident, found that only one wheel of the waggon moved to the death. The court, on motion in behalf of the lord of the franchise, granted a rule for shewing cause why the inquisition should not be quashed for this misbehaviour of the jury. On the day for shewing cause, Mr. *Hume Campbell*, counsel for the lord of the franchise, informed the court, that upon looking into precedents, he was satisfied he could not support the rule: and thereupon it was discharged. The case of the *King* and *Rolfe* was mentioned on this occasion, and greatly relied on. *Fost.* 266.

Dice. See **Stamps**.

Dissenters.

- I. *Protestant dissenters exempted from certain penalties by the act of toleration.*
- II. *Protestant dissenters intitled to certain privileges by the act of toleration.*
- III. *Laws against dissenters not altered by the act of toleration.*
- IV. *Laws relating to protestant dissenters made since the act of toleration.*

I. *Protestant dissenters exempted from certain penalties by the act of toleration.*

1. **A**S to all protestant dissenters in general. Against whom the seven following statutes have been enacted:

(1) By the 1 *El. c. 2. f. 14.* Every person not having reasonable excuse, shall resort to their parish church or chapel, or upon reasonable let thereof, to some usual place where common prayer shall be used, on every sunday and holiday; on pain of punishment by the censures of the church, or of forfeiting for every offence 12d.

(2) By the 23 *El. c. 1.* Every person above the age of 16, who shall not repair to some church, or chapel, or usual place of common prayer, shall forfeit for every month 20l. And if he shall forbear for 12 months he shall be bound to the good behaviour till he conform.

And

And if any person shall keep a schoolmaster, who shall not repair to church, or be allowed by the bishop, he shall forfeit 10*l.* a month, and the schoolmaster shall be imprisoned for a year.

(3) By the 29 *El. c. 6.* Every offender in not repairing to church, having been once convicted, shall without any other indictment or conviction, pay half yearly into the exchequer 20*l.* for every month afterwards, until he conform; which if he shall omit to do, the king may seize all his goods, and two parts of his lands.

(4) And by 3 *J. c. 4.* The king may refuse the 20*l.* a month, and take two parts of the land, at his option.

And any person retaining or keeping in his house any servant, or other, who shall not repair to church, shall forfeit 10*l.* a month.

(5) And by the 3 *J. c. 5.* No recusant in not repairing to church, being convicted thereof, shall enjoy any publick office, or shall practise law or physick, or be executor, administrator, or guardian.

And if any person shall send their children over seas for education, they shall forfeit 100*l.* and such child be disabled to inherit, or take any benefit by gift, conveyance, or devise.

(6) And by the 35 *El. c. 1.* If any person refusing to repair to church, shall be present at any assembly, meeting, or conventicle, under pretence of any exercise of religion, he shall be imprisoned till he conform; and if he shall not conform in three months, he shall abjure the realm; which if he shall refuse to do, or after abjuration shall not go, or shall return without licence, he shall be guilty of felony without benefit of clergy. And whether he shall abjure or not, he shall forfeit his goods, and shall forfeit his lands during life.

(7) And by the 22 *C. 2. c. 1.* If any person, being sixteen years of age, shall be present at any conventicle or meeting, under pretence of any exercise of religion, in other manner than according to the liturgy and practice of the church of *England*, at which there shall be five persons or more assembled, besides those of the household, if it be in an house where there is a family; or if it be in a house, field, or place, where there is no family, then where any five persons or more are so assembled,—every justice of the peace before whom information shall be made, shall (on pain of 100*l.* half to the informer) on proof by confession, or oath of two witnesses, or the notorious evidence of the fact, make a record thereof (which shall be afterwards certified to the sessions), which record

shall be a full conviction: Whereupon he shall impose upon every offender a fine of 5 s. for the first offence, and for every other offence 10 s. to be levied by distress and sale of the goods of the offender, or in case of the poverty of such offender, upon the goods of any other person then convicted of the like offence, so as the sum to be levied on any one person in case of the poverty of other offenders amount not in the whole to above 10 l. on occasion of any one meeting; one third to the king, one third to the poor, and one third to the informer and to such persons as the justice shall appoint, having regard to their diligence in discovering, dispersing, and punishing of the said conventicles.

And every person who shall suffer any such meeting in his house, outhouse, barn, or backside, shall forfeit 20 l. in like manner; and in case of his inability, it shall be levied on the goods of such persons who shall be convicted of being present.

If the penalty exceeds 10 l. an appeal lies to the sessions, And if the party is there found guilty by a jury, he shall pay treble costs. And no other court whatsoever shall intermeddle, but the quarter sessions only.

And justices and constables may with what force they think fit, upon refusal to open, break open doors where they shall be informed such conventicle is, and take the offenders into custody. And on certificate from any justice of peace of his particular information or knowledge of such unlawful meeting, and that he is not able, with such assistance as he can get, to suppress the same; any commissioned officer of the militia, or other his majesty's forces, with such troops or companies of horse and foot, and also the sheriff, and other ministers of justice, with such other assistance, as they shall think meet, or can get in readiness with the soonest, shall repair to the place, and by the best means they can, shall dissolve, dissipate, and prevent such meeting, and take the offenders into custody.

Thus stood the laws at the revolution.

Now by the aforesaid act of toleration, made in the first year of *William and Mary*, *ch.* 18. it is enacted, that neither the statutes aforesaid, nor any other made against papists and popish recusants (except the statutes of the 25 *C. 2. c. 2.* and the 30 *C. 2. st. 2. c. 1.* hereafter mentioned) shall extend to any person dissenting from the church of *England*, who shall be qualified in the manner following;

(1) They

(1) They shall at the general sessions of the peace, take the oaths of allegiance and supremacy. (1 G. c. 13.)

(2) They shall also there make and subscribe the declaration of the 30 C. 2. §. 2. c. 1. against popery.

(3) The place of meeting shall be certified to the bishop of the diocese, or to the archdeacon of the archdeaconry, or to the justices of the peace at the general or quarter sessions, and registred in the said bishop's or archdeacon's court, or recorded at such sessions. And the register, or clerk of the peace, shall register or record the same, and give certificate thereof to any who shall demand it, for which no more shall be taken than sixpence.

(4) The doors of the place where they meet shall not, during such time of their meeting, be locked, barred, or bolted.

(5) They shall not in writing deny the doctrine of the blessed trinity.

2. What hath hitherto been observed, regardeth all protestant dissenters in general. There are besides certain other laws, which concern their *teachers and preachers only*. Which are these three that follow ;

(1) By the 17 C. 2. c. 2. No person, who shall take upon him to teach or preach in any meeting or conventicle, under pretence of any exercise of religion, shall, unless only in passing upon the road, or unless required by legal process, come within five miles of a city, town corporate, or borough: nor shall be schoolmaster, or take any boarders or tablers to be instructed by himself or any other, without taking an oath of allegiance therein mentioned, on pain of 40 l. one third to the king, one third to the poor, and one third to him who shall sue in the courts at *Westminster*, assizes, or sessions. And two justices, on oath of the offence, may commit them for six months.

(2) And by the 22 C. 2. c. 1. If any person shall take upon him to preach or teach in any meeting or conventicle, in other manner than according to the practice of the church of *England*, he shall forfeit for the first offence 20 l. and for every other offence 40 l. And if he be a stranger, or in the judgment of the justice of the peace before whom he is convicted, unable to pay, it may be levied on the goods of any person present.

(3) And by the 13 & 14 C. 2. c. 4. §. 14. No person shall presume to consecrate and administer the sacrament before he be ordained priest, according to the form and manner of the church of *England*.

Now by the aforefaid act of toleration, it is provided, that no person dissenting from the church of *England*, in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation of dissenting protestants, shall be liable to any of the aforefaid penalties, who shall be qualified as follows :

- (1) He shall at the sessions take the oaths aforefaid.
- (2) He shall there make and subscribe the declaration of the 30 C. 2. *st. 2. c. 1.*
- (3) He shall there also declare his approbation of, and subscribe the 39 articles, except the 34th, 35th, and 36th (concerning the quality, examination, and subscription of such as are to be made ministers), and except these words of the 20th article, *viz. [the church hath power to decree rites or ceremonies, and authority in controversies of faith, and yet]* All which shall be entred of record in court ; for which the clerk of the peace shall have 6d. and no more.
- (4) The place for worship shall be certified as before.
- (5) The doors of the place where he shall preach or teach, shall not be locked, barred, or bolted.
- (6) He shall not deny, in his preaching or teaching, the doctrine of the blessed trinity.

3. Furthermore, there are besides the aforefaid general laws, certain other penal laws affecting the *quakers* in particular : namely, these two ;

- (1) By the 5 *El. c. 1.* If any person shall refuse to take the oaths of allegiance and supremacy, duly tendred, he shall incur a præmunire.
- (2) And by the 13 & 14 C. 2. *c. 1.* If any person, who shall maintain that the taking of an oath is unlawful, shall refuse an oath duly tendred, he shall forfeit a sum not exceeding 5 l. for the first offence, 10 l. for the second, and for the third shall abjure the realm or be transported.

But now by the act of toleration, quakers shall be discharged of the penalties of these laws, and of all others made against popish recusants, or protestant non-conformists, and shall enjoy all other benefits, under the like limitations, which any other dissenters enjoy, on their qualifying themselves in the same manner as other dissenters ; except that instead of the oaths at sessions, they shall be allowed to make and subscribe a declaration of fidelity, and to subscribe a profession of their christian belief (which are inserted under the title *Oaths.*)

4. And as to *anabaptists* in particular, it is enacted by the said act of toleration, that whereas some dissenting protestants

protestants scruple the baptizing of infants,—Every person in pretended holy orders, or pretending to holy orders, or preacher, or teacher, that shall take the oaths, and make and subscribe the declaration, and subscribe the 39 articles, except as in the case of other dissenting teachers as before, and except also part of the 27th article touching infant baptism, shall enjoy the same privileges as other dissenting teachers.

II. Protestant dissenters intitled to certain privileges by the act of toleration.

Besides the exemption from penalties, his majesty's protestant subjects are by the act of toleration intitled to certain privileges : which are of two kinds ; 1. Such as concern all protestant dissenters in general. 2. Such as concern their teachers in particular.

1. As to all *protestant dissenters in general*.——They shall not be *prosecuted in any ecclesiastical court, for or by reason of their not conforming to the church of England*.——But this shall not exempt them from paying of tithes, or other parochial duties, or any other duties to the church or minister, nor from any prosecution in any ecclesiastical court, or elsewhere, for the same.

Since this act, Mr. *Hawkins* observes from 3 *Lev.* 376. a prohibition will lie to the spiritual court proceeding against persons for incontinency, who have been married in a licensed conventicle. The case was this ; Two persons, who were published and married in a conventicle, were afterwards libelled against in the spiritual court, for incontinence and fornication ; and upon moving for a prohibition, time was assigned to shew cause why it should not go, and the proceedings in the ecclesiastical court were stayed in the mean time. Afterwards, it was agreed that a prohibition should be granted, and that the plaintiff should declare ; that so, upon demurrer, the point might be tried. But what the judgment was, or whether the cause proceeded to trial, doth not appear by the report. *Gibb.* 617.

But now, by the statute of the 26 *G. 2. c.* 33. such marriage, unless it be in a church or publick chapel, (except the marriages of quakers and jews respectively,) shall be void.

Mr. *Hawkins* likewise observes (1 *Haw.* 12.) that it having been doubted whether dissenting schoolmasters, as such, were exempted by the toleration act from the penalties inflicted upon them in the several acts against dissenters,

ters, it was farther enacted by the 12 *An. c. 7.* that whoever shall keep any school or seminary, or teach any youth as tutor or schoolmaster (unless he instruct them only in reading, writing, arithmetick, or such mathematical learning as relates to navigation, or some mechanical art, and that in the *English* tongue) without having first subscribed the declaration of the 13 & 14 *C. 2.* relating to conformity with the church of *England*, and without a licence from the bishop, he shall be imprisoned for three months. But this was repealed by the 5 *G. c. 4.* So that the doubt in this respect is left where it was.

In the case of *K. and Davison, T. 12 W.* as reported both by *Salkeld* and *L. Raymond, Davison*, a quaker, on an *habeas corpus* upon a writ of *excommunicato capiendis*, for teaching school without licence, was admitted to bail, till it should be determined whether this was an offence. But it doth not appear from either of those reports, what was the determination. 1 *Salk.* 105. *L. Raym.* 603.

And some other cases of the like kind there have been, wherein the prosecutors did not chuse to proceed. So that it seemeth to have been understood in practice, that the abovesaid clause exempts them from *spiritual censures* for teaching school without licence. And the act of toleration exempts them likewise from the *temporal* penalties of the aforesaid acts of the 23 *El. c. 1.* and 17 *C. 2. c. 2.* and of all other acts (except as therein excepted) made against *papists* or *popish recusants*. But there is a clause in the statute of the 13 & 14 *C. 2. c. 4.* unto which the said act of toleration doth not seem by any expression therein to extend; by which it is enacted, that *every schoolmaster keeping any publick or private school, and every person instructing or teaching any youth in any house or private family as a tutor or schoolmaster, shall before his admission subscribe before the ordinary the declaration of conformity to the liturgy of the church of England, on pain of being disabled to hold the said school: And if any schoolmaster, or other person, instructing or teaching youth in any private house or family as tutor or schoolmaster, shall teach any youth as tutor or schoolmaster, before licence obtained from the bishop or ordinary of the diocese, and before such subscription as aforesaid; he shall for the first offence be imprisoned three months, for the second and every other offence be imprisoned three months and forfeit 5 l. s. 8, 9, 10, 11.*

Moreover; If any person dissenting from the church of *England*, shall be appointed to the office of high constable, petit constable, churchwarden, overseer of the poor, or any other parochial or ward office, and such person shall

shall scruple to take upon him any of the said offices in regard of the oaths, or any other matter or thing, required by the law to be taken or done, in respect of such office, every such person shall and may execute such office by a sufficient deputy by him to be provided, that shall comply with the laws on this behalf. Provided, that the deputy be allowed and approved by such persons, and in such manner, as such officers should by law have been allowed and approved.

2. *As to their teachers or preachers,*—Every teacher or preacher, in holy orders, or pretended holy orders, that is a minister, preacher, or teacher of a congregation, that shall take the oaths, and subscribe the declaration and articles as aforesaid, shall be thenceforth exempted from serving upon any jury, or from being chosen or appointed to bear the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred, city, town, parish, division, or wapentake.

But this seems clearly not to extend to *quaker* teachers or preachers; for they are neither in *holy orders*, nor *pretended holy orders*. It is true, by a subsequent statute of the 7 & 8 *W.* quakers are exempted from serving on *juries*; but neither by that, nor any other act, are any quakers exempted from serving the office of churchwarden, overseer of the poor, or other parochial or ward office, by themselves, or a sufficient deputy to be by them provided.

III. Laws against dissenters not altered by the act of toleration.

1. No clause in the toleration act shall give any ease or benefit, to any popish recusant; or to any that shall deny in preaching or writing the doctrine of the trinity. 1 *W.* c. 18. s. 17.

And every justice of the peace may at any time require any person that goes to any meeting for the exercise of religion, to make and subscribe the said declaration, and to take the said oaths (or if quakers, the declaration of fidelity); and upon refusal thereof, such justice shall commit such person to prison; and shall certify his name to the next sessions; and if he shall refuse again to make and subscribe the declaration there, he shall be taken for a popish recusant convict, and suffer accordingly. *id.* s. 12.

2. The toleration act shall not extend to the statute of the 25 *C. 2. c. 2.* which requires, that all persons admitted to civil or military offices, as is therein mentioned, shall

shall receive the sacrament according to the usage of the church of *England*, and subscribe the declaration against transubstantiation.

3. The toleration act shall not extend to the statute of 30 C. 2. *f.* 2. *c.* 1. which disables persons from sitting in either house of parliament, or coming to court, who shall not subscribe the declaration therein expressed against popery.

IV. Laws relating to protestant dissenters, made since the act of toleration.

1. If any person dissenting from the church of *England* (not in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation) who should have been intitled to the benefit of the toleration act, if he had duly taken, made and subscribed the oaths and declaration, or otherwise qualified himself as required by the act, shall be prosecuted on any of the penal statutes, from which protestant dissenters are exempted by the said act,—shall at any time during such prosecution, take, make, and subscribe the said oaths and declaration, or being a quaker shall qualify according to that act, either in the manner prescribed by that act, or before two justices who shall take and return the same to the next sessions to be there recorded; such person shall be intitled to the benefit of the act, as fully as if he had qualified himself in the time prescribed by the act, and shall from thenceforth be discharged from all the penalties and forfeitures incurred by force of any of the aforesaid penal statutes. 10 *An. c.* 2. *f.* 8.

2. And any preacher or teacher, duly qualified, shall be allowed to officiate in any congregation, altho' the same be not in the county where he was so qualified; provided that the place of meeting hath been duly certified, and registred, or recorded; and such teacher or preacher shall, if required, produce a certificate of his having so qualified himself, under the hand of the clerk of the peace where he was qualified; and shall also before any justice of such county where he shall so officiate, make and subscribe such declaration, and take such oaths as are mentioned in the act of toleration, if thereunto required. 10 *An. c.* 2. *f.* 9.

3. If any mayor, bailiff, or other magistrate, shall wilfully resort to, or be present at any publick meeting for religious worship, other than of the church of *England*, in the gown or other peculiar habit, or attended with the
ensigns

ensigns belonging to his office, he shall be disabled to hold the same, or any other publick office. 5 G. c. 4. s. 2.

Distillers. See *Excise*.

Distress.

THE remedy for recovering rent by way of distress seems first to have come over to us from the civil law. For anciently in the feudal law, the not paying attendance at the lord's courts, or not doing the feudal service was a forfeiture of the estate: But these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law: that is, the land that is let out to the tenant is hypothecated, or as a pledge in his hands, to answer the rent agreed to be paid to the landlord, and the whole profits arising from the land are liable to the lord's seizure for the payment and satisfaction thereof.

Concerning which we will shew,

- I. For what cause a distress shall be.*
- II. What goods may be distrained, and what not.*
- III. At what time the distress shall be taken.*
- IV. Where the distress shall be made.*
- V. That reasonable distress shall be taken.*
- VI. Manner of making distress.*
- VII. Distress how to be demeaned.*
- VIII. Of rescous and pound breach.*
- IX. Replevyng the distress.*
- X. Sale of the distress.*
- XI. Irregularity in the proceedings.*
- XII. Landlord re-entring on non-payment.*
- XIII. Case of tenant holding over.*
- XIV. Attorning to strangers.*
- XV. Deserting the premises.*
- XVI. Rent in case of an extent or execution.*
- XVII. Rent on the death of tenant for life.*
- XVIII.*

XVIII. Rent how far recoverable by executors or administrators.

XIX. Of distress by warrant of justices of the peace.

1. For what causes a distress shall be.

Rent in arrear

1. Distress for rent must be, for rent in arrear; therefore it may not be made on the same day on which the rent becomes due; for if the rent is paid in any part of that day, whilst a man can see to count money, the payment is good.

Tender of
payment.

2. It must not be after tender of payment; for if the landlord come to distrain the goods of his tenant for rent behind, before the distress the tenant may upon the land tender the arrearages, and if after that a distress be taken, it is wrongful: And if the landlord have distrained; if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the distress, and if he doth not, the detainer is unlawful. Even so it is, in case of a distress for damage feasant (or damage done by cattle trespassing), the tender of amends before the distress, maketh the distress unlawful; and after the distress, and before the impounding, the detainer unlawful. 2 *Inst.* 107.

But in this case, altho' the owner tender sufficient amends, yet he cannot take his beasts out of the pound, if the amends be refused; but he must replevy: and if it be found at the trial that the amends was not sufficient, the person on whom they trespassed shall have damages; if the amends tendered were sufficient, then the owner of the beasts shall have damages. *Dr. & St.* 112.

Seck rents and
chief rents

3. The like remedy may be had by distress, impounding and sale, in cases of rent seck, rents of assize, and chief rents, as in case of rents reserved upon lease. 4 *G.* 2. c. 28. f. 5.

Note, there are three kinds of rents; rent *service*, rent *charge*, and rent *seck*.

Rent *service* is, where the tenant holdeth his land of his lord by fealty and certain rent; or by homage, fealty, and certain rent; or by other service, and certain rent. And it is called a rent service, because it hath some corporal service incident to it, which at the least is fealty. 1 *Inst.* 141, 2.

Rent *charge* is so called, because the land for payment thereof, is charged with a distress; but before this act such distress could not be sold, but only detained till the rent should be paid.

If the rent be reserved, without any clause put in the deed of distress for the same, then it is called a rent *seck*, *redditus fixus*, or dry rent : and the difference between a rent charge and a rent seck is, that there is a clause of distress annexed to one, and no such clause to the other ; and therefore the one is a charge upon the land, but for the other the grantee had formerly no remedy but to charge the person of the grantor in a writ of annuity. *1 Inst.* 143.

Rents of *assize* are the certain rents of freeholders and ancient copyholders, so called because they are assized and certain, and thereby distinguished from *redditus mobiles*, farm rents for life, years, or at will, which are variable and uncertain. *2 Inst.* 19.

4. Where the agreement is not by deed, the landlord may recover a reasonable satisfaction, in an action on the case. *11 G. 2. c. 19. s. 14.* Agreement not by deed.

5. So an action of debt may be brought against a tenant for life, in pursuance of the statute of the *8 An. c. 14.* which enacteth, that whereas before the said statute no action of debt did lie against a tenant for life or lives, for any arrears of rent during the continuance of such estate for life or lives ; it shall be lawful, for any person having any rent in arrear or due upon any lease or demise for life or lives, to bring an action of debt for such arrears, in like manner as he might have done in case such rent were reserved upon a lease for years. *s. 4.* Rent reserved on a lease for life.

6. Persons having rent in arrear, upon any lease determined, may distrain for such arrears after the determination of the lease, in the same manner as if it had not been determined ; provided that such distress be made in six months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrear became due. *8 An. c. 14. s. 6, 7.* Lease determined.

7. Whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under tenants ; and whereas many of those leases cannot be renewed without a surrender of all the under leases derived out of the same, whereby it is in the power of any such under tenants to prevent or delay the renewing of the principal lease ; it is enacted, that in such case, the chief leases may be renewed, without surrendring all the under leases ; and the like distress or entry may be had, as if the former chief lease had been still kept on foot and continued, or the under leases had been renewed under such new principal lease. *4 G. 2. c. 28. s. 6.* Lease renewed.

S. Before

Two distresses
for one rent.

8. Before the statute of the 17 C. 2. c. 7. in case a distress was too little, where sufficient distress was to be had, a man could not distrain again, be the demand never so great; for it was his folly that at first he distrained no more. *Mo. 7. Comb. 546.*

But now, by the said statute, in all cases where the value of the cattle distrained shall not be found to be to the full value of the arrears distrained for; the party to whom such arrears were due, his executors or administrators, may distrain again for the residue of the said arrears. *f. 4.*

So in like manner, where the distress is made by virtue of the warrant of a justice of the peace, in nature of an execution. And the distinction seemeth to be this: where a person hath an intire duty, he shall not split the entire sum, and distrain for part of it at one time, and for other part of it at another time, and so *toties quoties*, for several times; for that is great oppression. But if a man seiseith for the whole sum that is due to him, and only mistakes the value of the goods seised (which may be of very uncertain, or even imaginary value, as pictures, jewels, race horses, and the like), there is no reason why he should not afterwards complete his execution by making a further seizure. *Burrow. 589.*

Distraining
where no rent
is due.

9. If any distress and sale shall be made, for rent in arrear and due, when none is in truth due, the owner shall recover double value with full costs. *2 W. Sess. 1. c. 5. f. 5.*

And if the distress be taken of goods without cause, the owner may make *rescous*; but if they be distrained without cause, and impounded, the owner cannot break the pound and take them out, because they are in the custody of the law. *1 Inst. 47.*

II. What goods may be distrained, and what not.

Valuable pro-
perty.

1. Distress for rent must be of a thing, whereof a valuable property is in somebody; and therefore dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be distrained. *1 Inst. 47.*

Separate from
the person.

2. Altho' it be of valuable property, as a horse; yet when a man or woman is riding on him, or an ax in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained. *1 Inst. 47.*

But it is said, that if one be riding upon a horse damage feasant, the horse may be led to the pound with the rider upon him. *1 Sid. 422, 440.*

And it hath been held, that horses joined to a cart, with a man upon it, cannot be distrained for rent (altho' they may for damage feasant); but both cart and horses may, if the man be not upon the cart. 1 *Vent.* 36.

3. Valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequence are for the commonwealth, and are there by authority of law: as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor an horse in a hostelry, nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a taylor's shop, nor sacks of corn or meal in a mill, nor any thing distrained for damage feasant, for it is in custody of the law; and the like.

For maintenance of trades.

1 *Inst.* 47.

4. Beasts belonging to the plough shall not be distrained (which is the ancient common law of *England*, for no man shall be distrained by the utensils or instruments of his trade or profession, as the ax of the carpenter, or the books of a scholar) while goods or other beasts may be distrained.

Tools of a man's profession.

1 *Inst.* 47.

But this rule holds only in distresses for rent arrear, amerciaments, and the like; but doth not extend to cases, where a distress is given, in the nature of an execution, by any particular statute, as for poor rates, and the like. 3 *Salk.* 136.

So in the case of *Hutchins and Chambers*, *E.* 31 *G.* 2: On a special verdict: Several geldings were distrained for the poor rate, which were stated to be beasts of the plow and cart; when there were other goods more than sufficient to answer the value of the demand. It was objected, that by the statute of 51 *El.* 3. *st.* 4. (which was also in affirmance of the common law) *none shall be distrained by his beasts that gaigne his land.* In the argument of this cause, it was observed, that this duty on the statute of the 43 *Eliz.* is not a tax upon the land, nor payable out of it; but a charge upon the person: and it is a tax throughout the kingdom, and for publick benefit: That it is not to be considered upon the foot of a common law distress: That the nature, design, and end of this publick duty, required the most effectual and speedy remedy that could be devised: That the reason why beasts of the plow could not be distrained at common law, will not hold in the present case. This is similar to an execution, and essentially different from a distress at common law. By the common law the distress could not be sold: It was only taken *nomine pæne*; not as a satisfaction (which this is) for the duty. The reasons for the privi-

lege do not now hold. Agriculture then wanted and required encouragement, and must have been impeded by a common law distress: Now, it doth not. Then, the thing distrained could not be sold, and remained useless: Now, it may be sold. This distress is not taken as a pledge, or a mean to compel; but for a satisfaction for the duty itself, a personal duty, and of a publick nature. — And by lord *Mansfield* Ch. J. This seising is but partly analogous to the common law distress; but is much more analogous to the common law execution. In the old common law distresses, which were in nature of a *nomine pænæ* to compel payment, it would have been absurd to have suffered the implements by which a man gained his livelihood to be holden as a pledge; because that would have been taking from the man, the only means he had, of being able to pay the debt. But this reason doth not hold, where the things distrained may immediately be sold by way of satisfaction; which, tho' called a distress, yet really is, in this respect, an execution. And in cases of execution, beasts of the plow may be distrained, altho' there be other sufficient distress. And the court were unanimously of opinion, that beasts of the plow are distrainable under the statute of the 43 *Eliz.* and such like acts of parliament. *Burrow.* 579.

Things fixed to the freehold.

5. Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a house, or the like, cannot be distrained. 1 *Inst.* 47.

Things for which a replevin will not lie.

6. Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained. 2 *Bac. Abr.* 109.

But money in a bag sealed may be distrained; for that the bag sealed may be known again.

Corn or hay cut.

7. By the 2 *W. sess.* 1. c. 5. Persons having rent arrear on any demise, lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with the rent, and may lock up or detain the same in the place where found, in the nature of a distress; so as the same be not removed to the damage of the owner, out of the place where found and seized, but be kept there (as impounded) till replevied or sold. *f.* 3.

Corn or hay growing.

8. Also by the 11 *G.* 2. c. 19. The landlord may take and seize corn, grass, hops, roots, fruits, pulse, or other product growing, as a distress; and the same may cut, gather, make, cure, carry and lay up, when ripe, in the barns or other proper place on the premises; and if there

shall

shall be no barn or proper place on the premises, then in any other barn or proper place which he shall procure, so near as may be to the premises; the appraisment whereof shall be taken when cut, gathered, cured, and made, and not before. *f. 8.*

And notice of the place where the goods so distrained shall be lodged, shall in one week after the lodging thereof be given to the tenant, or left at the last place of his abode. *f. 9.*

9. Where a stranger's beasts escape into the land, they may be distrained for rent, tho' they have not been levant and couchant (that is, tho' they have not been in the ground for a good space of time, or so long as to have laid down and rose up again to feed) provided they are trespassers: But if the tenant of the land is in default, in not repairing his fences, whereby the beasts came into the land, the lessor cannot distrain such beasts, tho' they have been levant and couchant, unless he have caused notice to be given to the owner, and the owner suffers them to remain there afterwards. *Lutw. 364.*

Cattle escaped on the premises.

But in case of an ancient seignior, the lord may distrain cattle for services, which came in by escape, tho' they were not levant and couchant, altho' it be in default of the fences, which the tenant of the land ought to maintain; because the lord hath nothing to do with the repairing of the fences, and he hath no remedy but by distress: But the owner may prevent the distress, by making fresh pursuit; for then the cattle remain as it were in his own possession. *L. Raym. 168, 9. H. 8 W. Kemp and Crews.*

But in case of rent reserved upon a lease for years, the lessor cannot distrain such cattle, until they be levant and couchant; for if the lessor had had the lands in his own hands, he ought to have repaired the fences; and when he puts in a lessee, he ought by covenant to oblige him to repair: and therefore in that case, if the law would allow the lessor to distrain the cattle of a stranger which come in by escape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own wrong. Therefore if the cattle come in by default of the owner of the cattle, then they may be distrained before they be levant and couchant; but if in default of the tenant of the land, there they cannot be distrained until they have been levant and couchant, that is to say, for rent upon leases for years. And in such case the lessor shall not take the cattle before that he has given notice to the owner, that they are upon the

land liable to his distress; and if he doth not come to take them away, then they become distrainable. And by *Treby* chief justice; Where the cattle escape accidentally, there they are not distrainable, until they have been levant and couchant; but if they escape by default of their owner, they are distrainable the first minute. *id.*

Cattle de-
pastured.

10. A person driving sheep to *London* to sell, by agreement with the master of an inn, puts them into a ground at so much a score for a night. The landlord seeing them, asked whose they were, but consented to their staying there, and afterwards the same evening distrained them for rent due to him from the master of the inn. And it was adjudged for the landlord. *T. 1 W. Forvkes and Joyce, in C. B. 3 Lev. 260. 2 Vent. 50.*

But in the same case, upon a bill for relief in equity, the lords commissioners seemed to think, that the grounds lying to the inn, and used therewith, ought to have the same privilege as the inn hath, and that passengers cattle ought not to be distrainable there. *2 Vern. 129.*

And it appeared in this case, that on the landlord's coming and seeing the sheep, he pretended to be angry. Upon which the owner offered to take out the sheep, at which time they were not distrainable for the rent, having not been levant and couchant upon the lands. So that the court looked on the consent as a fraud, to get them to be left all night, by which they became liable to the distress. And it was decreed, that the landlord should answer for the value of the sheep, and pay costs both in law and equity. *Prec. Chan. 7.*

So where a rent charge was arrear for 20 years, and cattle escaped out of the next ground, and were distrained; lord *Nottingham* (in equity) relieved against it. *2 Vern. 231. H. 1690. Brodon and Pierce.*

Cattle damage
feasant.

11. If ten head of cattle are doing damage, a man cannot take one of them and keep it till he be satisfied for the whole damage; but he may bring an action of trespass for the rest. *12 Mod. 660. H. 13 W. Vasper and Edwards.*

If a man hath common for ten cattle, and he puts in more; the surplussage above ten may be taken damage feasant. *1 Roll's Abr. 665.*

If a man come to distress, and see the beasts in his ground, and the owner chase them out, of purpose before the distress taken; yet the owner of the soil cannot distress them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distress. *1 Inst. 161.*

For distress damage feasant is the strictest distress that is ; and the thing distrained must be taken in the very act : for if the goods are once off, tho' on fresh pursuit, the owner of the ground cannot take them. 12 Mod. 661.

III. At what time the distress shall be taken.

For a rent or service the lord cannot distrain in the night, but in the day time ; and so it is of a rent charge : but for damage feasant, one may distrain in the night ; otherwise, it may be, the beasts will be gone before he can take them.

1 Inst. 142.

For before sun rising, or after sun set, no man may distrain but for damage feasant. *Mirroure c. 2. f. 26.*

IV. Where the distress shall be made.

Where:

1. The king's officers, as sheriffs and other, shall not take distresses in the fees wherewith churches in times past have been endowed ; but distresses may be taken in possessions of the church newly purchased. 9 Ed. 2. c. 9. Church lands.

2. A man may distrain in places or lands within the fee, liable to distress, and not elsewhere. 52 H. 3. c. 15. On the premises.
2 Inst. 131. *Mir. c. 2. f. 26.*

3. And by the 11 G. 2. c. 19. The landlord may distrain any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any ways belonging to the premises demised. f. 8. On the common.

4. No person (except the king's officers) shall take distresses in the king's highway. 52 H. 3. c. 15. In the highway.

And the reason is, because the king's subjects ought to have free passage, as well to fairs and markets, as about their other affairs. But yet this shall not be taken, to make the distress utterly unlawful, so as to take advantage thereof in bar to an avowry, but to this purpose, that if the lord distrain in the highway, the tenant may have an action against him upon this statute. 2 Inst. 131, 132.

5. But by the 11 G. 2. c. 19. If any tenant for life, years, at will, sufferance, or otherwise, shall fraudulently or clandestinely convey off the premises his goods or chattels, to prevent the landlord from distraining ; such landlord, or any person by him lawfully impowered, may in 30 days next after such conveying away, seize the same wherever they shall be found, and dispose of them in such manner, as if they had been distrained on the premises. Carried off the premises.
f. 1.

But no landlord shall distrain any goods sold *bona fide*, and for a valuable consideration, before such seizure made, to any person not privy to such fraud. *f. 2.*

And if any tenant shall so fraudulently remove and convey away his goods or chattels, or if any person or persons shall wilfully and knowingly aid or assist him in such fraudulent conveying away or carrying off of any part of his goods or chattels, or in concealing the same; every person so offending shall forfeit to the landlord double the value of such goods, to be recovered in any court of record at Westminster. *f. 3.*

But if the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50*l.* the landlord or his agent may exhibit a complaint in writing (A) before two justices of the peace of the same county or division, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon (B) the parties concerned, examine the fact and all proper witnesses upon oath (or if it is a quaker, upon affirmation required by law;) and in a summary way determine whether such person or persons be guilty of the offence, with which he or they are charged, and to inquire in like manner of the value of such goods and chattels; and upon full proof of the offence, by order (C) under their hands and seals the said justices shall adjudge the offender or offenders to pay double the value of the said goods and chattels, to such landlord, his bailiff, servant, or agent, at such time as the said justices shall appoint: And if the offender or offenders, having notice of such order, shall refuse or neglect so to do, they shall by their warrant (D) levy the same by distress; and for want of such distress (E) may commit the offender or offenders to the house of correction (F) there to be kept to hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied. *f. 4.*

Persons aggrieved by order of such justices, may appeal to the next general or quarter sessions; who may give costs to either party. *f. 5.*

And where the party appealing shall enter into recognizance, with one or two sureties, in double the sum so ordered to be paid, with condition to appear at such sessions; the order of the justices shall not be executed against him in the mean time. *f. 6.*

T. 29 & 30 G. 2. K. and *Biffex*. Order made by two justices, reciting that a complaint had been made to them in writing, by *A. Clavey* against *J. Biffex*. that he the said *Clavey* demised his estate in the parish of *Shelley* in the county of *Somerset*, to *William Thatcher*, at the yearly rent of 44l; and that there was due and in arrear from *Thatcher* to him for rent of the said estate, on the 5th day of *April* last, 24l. 15s. 8d. $\frac{1}{2}$; and that he the said *Clavey* would have distrained the goods and chattels of the said *W. Thatcher* upon the said estate, in order to obtain satisfaction of the said rent; but to prevent him from so doing, the said *Biffex*, on or about the 27th, 28th, and 29th days of *August* last, did knowingly and wilfully aid and assist the said *Thatcher*, in fraudulently conveying and carrying off from the said estate his the said *Thatcher's* goods and chattels, and also in concealing the same, being under the value of 50l. that is to say two cows, one heifer, and ten hundred weight of cheese, of the value of 20l; whereby the said *Clavey* was prevented from distraining the same, in order to obtain satisfaction for the said rent, and contrary to the statute 11 G. 2; and therefore praying us to grant him our warrant of summons, requiring you the said *J. Biffex* to appear before us, and that we would examine the fact, and thereupon make such order therein for his relief, as the said statute directs and requires, and as should be agreeable to justice: Whereupon we the said justices, residing near the said estate from whence the said goods and cattle were removed, and neither of us any way interested in the said estate, did issue our warrant of summons, requiring you the said *J. Biffex* to attend us thereon to answer the said complaint; and you having attended accordingly, and we in your presence having examined the witnesses produced by the said *A. Clavey* upon oath, and heard what was alledged by you in your defence, do adjudge that the said complaint is true; and that the said goods and cattle of the said *W. Thatcher*, in which you so aided and assisted in conveying and carrying off from the said estate, and also in concealing the same, were of the value of 20l; and that you have thereby forfeited double of the value of the said goods and cattle, being the sum of 40l; to the said complainant *A. Clavey*, by virtue of the said statute: We therefore in pursuance of the said statute, do adjudge, order, and require you the said *J. Biffex* within the space of three days from the date hereof, to pay to the said *A. Clavey* the sum of 40l; which if you shall neglect to do, such further proceedings will be then had against you to

inforce the payment thereof, as the said statute directs and requires. Given under our hands and seals, this 5th day of *January* 1756.—This order was affirmed by the sessions upon appeal. Both the orders were removed by certiorari into the king's bench. It was moved to quash the same. Objections taken: 1. The complaint is said to be taken in writing, but not upon oath. 2. It is only said, that he demised to *W. Thatcher*; but not said for what estate or term. 3. It is stated, so much was due for rent, but not said for what term: it might be due 20 years ago. It is not stated to be due, when *Thatcher* removed his goods. 4. The words of the order are, goods and *cattle*; of the statute, goods and *chattels*. 5. No certain time is alledged when the defendaut aided and assisted; only said, on or about the 26th, 27th, or 28th of *August*. 6. Not stated that *Thatcher* did carry off his goods: only that *Biffex* did aid and assist him in carrying them off. 7. They adjudge the complaint true, but do not state the evidence: and this is a conviction, not an order: and for any thing that appears, it might be upon *Clavey's* evidence alone. 8. It is not stated that the goods were under the value of 50; which is the ground of the justices jurisdiction. 9. The words of the statute are, if any person shall be a tenant of any lands, tenements, or hereditaments: The word used in the order is *estate*; which may be a thing incorporeal, or may mean the interest in the land, and so not within the statute. 10. It should appear, whether the landlord has a right to distrain: By the 8 *An. c.* 14. the landlord may distrain at any time within six months after the expiration of the term: It doth not appear these six months were not expired; and if they were, this is no offence.—After consideration, Mr. justice *Denison* delivered the resolution of the court: I think the most material objection is, whether this is an order or a conviction. If a conviction, the evidence ought to have been set out. And there has been no doubt (notwithstanding the case of *K. and Pulleine*, 1 *Salk.* 369.) that in a conviction the evidence must be set out, that the court may judge upon it. So it was held by lord *Hardwicke* in the case of *K. and Lloyd*, *Str.* 996. and in that case it was objected, that as it subjected the party to a penalty, tho' in the statute it was called an order, yet it should be construed as a conviction: but the court said, every act of the justices, which subjects the party to a penalty, shall not be construed as a conviction. *K. and Venables*, *Str.* 630. 2 *L. Raym.* 1406. upon the statute for licensing alehouses, considered as an order. *K. and*

Blackwell, M. 4 Geo. which the court said was a strong case, and must be considered as an order. I understood from my lord *Hardwicke*, in the case of *K. and Lloyd*, that his ground of the difference was founded upon the expressions of the statute, and not upon the penalty; as where the words of a statute are, “of which he shall be convicted”, it is to be construed as a conviction. Here it is extremely strong; the statute calls it an order: and in the nature of it, it is an examination upon a complaint. If the party was never summoned, this court upon affidavit will grant an information against the justices: but the summons need not be set out; and the court will intend the justices have done right, in case the contrary does not appear upon the face of the order. As to the 1st objection: This is not an information, but a complaint; when the party is summoned, the witnesses are to be examined upon oath, but the complaint need not be upon oath. In answer to the 2d objection: As the order has followed the words of the statute, we will not intend it a case wherein the justices had not a jurisdiction. The court will not, in case of an order, intend that the justices have done wrong. As to the 3d objection: It is sufficiently alledged, in an order; his assisting the tenant to carry away the goods, as it is here alledged, is sufficient to shew the rent continued then to be in arrear; and the rather, as the defendant might have availed himself of the rent paid, by proving it before the justices. I much doubt, whether in a declaration it would not be sufficient to say, the rent was in arrear at such a day; and I think it would lie upon the defendant to prove that the rent does not remain in arrear. As to its not being said, for what time the rent was due; this is mere matter of form. As to the fifth objection: *About*, in common parlance, means in this case three days or near it. They might be three days in carrying the goods away. The days are not material, even in legal proceedings. 1 *L. Raym.* 581. And in the case of *K. and Simpson, H. 3 Geo. Str.* 46. the day and hour in a conviction are not material. By this statute no time is limited, when the complaint shall be made: it may be made at any time. Suppose the defendant had paid the penalty on a different complaint made, he might easily have shewn it. As to the 6th: The answer is obvious; if *Thatcher* had not carried his goods away, the defendant could not have aided in carrying them. The statute makes two offences; one, carrying the goods away; the other, aiding in carrying them away. It is only necessary here to state the

the offence which the defendant had been guilty of, which this order does in the words of the statute. In the case of *K. and Monk, M. 13 Geo. 2.* there was a conviction for aiding and assisting in killing a buck. It was objected, that it was not charged the buck was killed. But the court held, that as the conviction was in the words of the statute, it was sufficient. And the court held they were all principals, as well those that killed the buck, as those that assisted. And this was the case of a conviction.——All the other objections may have this general answer; that in the case of orders, where the justices have jurisdiction, we will intend they have acted right; and if they have done wrong, they may be punished by an information.——Let the orders be confirmed.

So in the case of *K. and Middlehurst, T. 30 & 31 G. 2.* Two justices make an order against one *Thomas Middlehurst*, for wilfully and knowingly aiding or assisting *John Chesterton* the tenant of *Sir Thomas Fleetwood*, in fraudulently removing and conveying away five cows and other goods, or in concealing the same. Which order, on appeal to the sessions, was confirmed. It was moved to quash these orders, upon two objections: 1. The whole adjudication refers to the complaint of one *Thomas Weston*, wherein there is no charge upon *Chesterton* the tenant at all; neither is it stated, that *Chesterton* the tenant did remove the goods. 2. The act creates two offences, viz. assisting in removing, and assisting in concealing the goods. Now it is not specifically charged upon the defendant *Middlehurst*, that he wilfully and knowingly did either one of these two things: It is only alledged that he wilfully and knowingly did one or the other. In 1 *Salk. 371. Rex v. Stocker*, An indictment for forging, or causing to be forged, was holden ill, because the charge was in the disjunctive. So, 2 *Haw. 225.* An indictment charging a man disjunctively, is void. For the offences are distinct; and it appears not, of which of them the defendant is accused. So here, it doth not appear, of which of the two offences the justices have convicted him.—On a rule to shew cause, To the 1st objection, that it is not described sufficiently what the offence is; it was answered, that this is an order, and the court will not intend it to be ill. To the 2d objection, as to the charge being in the disjunctive, that he assisted the tenant in removing or concealing the goods, it was answered, that the crime and the punishment are the same upon both; and the defendant was heard.—By lord *Mansfield* Ch. J. Upon indictments, it hath been determined, that an alternative charge

charge is not good (as, forged *or* caused to be forged); tho' one only need be proved, if laid conjunctively (as, forged *and* caused to be forged): But I do not see the reason of it: The substance is exactly the same; the defendant must come prepared against both; and it makes no difference to him in any respect. But this is an order: And being good in substance, needs not be literally so strict.—And by the court, the rule to shew cause was discharged, and consequently both orders affirmed. *Burrow.* 399.

V. That reasonable distresses shall be taken.

Distresses shall be reasonable, and not too great; and he that taketh great and unreasonable distresses, shall be grievously amerced. 52 *H. 3. c. 4.* Distress to be reasonable.

For example, if the lord distrain two or three oxen for 12d. or the like small sum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12d. of his own shewing, he shall make fine: or the party may have his action upon this statute. 2 *Inst.* 107.

If the lord distrain an ox, or horse, for a penny; if there were no other distress upon the land holden, the distress is not excessive: but if there were a sheep, or a swine, or the like, then the taking of the ox or horse is excessive, because he might have taken a beast of less value. 2 *Inst.* 107.

VI. Manner of making distress.

1. Gates or inclosures may not be broken open, nor thrown down, to make a distress. 1 *Inst.* 161. Breaking gates.

2. Nor may the lessor enter into the tenant's house, unless the doors are open. *Read. Distr.* 2 *Bac. Abr.* Opening doors.

III.

Upon a question about taking a distress, it was held by the lord chief justice *Hardwicke*, at the summer assizes at *Exeter*, 1735, that a padlock put on a barn door could not be opened by force, to take the corn by way of distress. *Vin. Distr.* (E. 2.) 6.

3. Where any goods or chattels fraudulently or clandestinely conveyed or carried away, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall be lawful for Aid of the constables and justices.

for the landlord, or his steward, bailiff, receiver, or other person or persons impowered, to take and seize, as a distress for rent, such goods and chattels (first calling to his assistance the constable, headborough, borsholder, or other peace officer of the hundred, district, or place, where the same shall be suspected to be concealed, and in case of a dwelling house, oath being also first made (G) before a justice of the peace, of a reasonable ground to suspect that such goods or chattels are therein) in the day time to break open (H) and enter into such house, barn, stable, out-house, yard, close, and place; and to take and seize such goods and chattels for the said arrears of rent, as he might have done if they had been in any open place. 11 G. 2.

c. 19. s. 7.

But except it be in this case where the goods are clandestinely conveyed, it may seem from what hath been said, that the landlord hath no mean to come at the goods in order to make distress, if the tenant shall think fit to lock up his gates, and shut the doors: And the like may be observed in cases of distress for the levying a penalty, by warrant of justices of the peace (unless such penalty, or part thereof, be given to the king). Which matter may seem to require some consideration.

Part in the name
of the whole.

4. If a landlord comes into a house, and seizes upon some goods as a distress, in the name of all the goods of the house; that will be a good seizure of all. 6 Mod. 215.

VII. Distress how to be demeaned.

Impounding off
the premises.

1. By the 52 H. 3. c. 4. *None shall cause any distress that he hath taken, to be driven out of the county where it was taken: and if one neighbour do so to another of his own authority (as for damage feasant, or rent charge, 2 Inst. 106.) he shall make fine as for a thing done against the peace; and if the lord so presume to do against his tenant, he shall be grievously punished by amercement.*

Before this act, at the common law, a man might have driven the distress to what county he pleased: which was mischievous, for two causes; 1. Because the tenant was bound to give the beasts being impounded in an open pound sustenance, and being carried into another county, by common intendment he could have no knowledge where they were. 2. He could not know where to have a replevy; but the party was, before this statute, driven to his action upon his case. 2 Inst. 106.

And albeit this statute be in the negative, yet if the tenancy be in one county, and the manor in another county, the lord may drive the distress which he taketh in the tenancy to his manor in the other county; for that the tenant is out of both the said mischiefs: for the tenant by doing of suit and service to the manor, by common indentment may know what is done there, and therefore may give his beasts sustenance. And to know where to have his replevy, the bailiff of the manor usually drives the cattle distrained to the pound of the manor. And hereby it is to be noted, that a case out of the mischief, is out of the meaning of the law, tho' it be within the letter. 2 *Inst.* 106.

And by the 1 & 2 P. & M. c. 12. it is further enacted, that *no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe, where such distress shall be taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the said distress was taken; and no cattle or other goods distrained for any cause at one time, shall be impounded in several places, whereby the owner may be constrained to sue several replevies; on pain of 100 s. to the party grieved, and treble damages. s. 1.*

T. 21 G. 2. *Gimbart and Pelah.* The defendant justified impounding cattle damage feasant. And on evidence it appeared, he put them into the next pound, though it happened to be in another county. And *Lee Ch. J.* held, it did not make him a trespasser, though it subjected him to the penalty of the statute of the 1 & 2 P. & M. Str. 1272.

Note, a pound is either *overt* or open, as in a pinfold made for such purposes, or in his own close, or in the close of another by his consent; and it is therefore called open, because the owner may give his cattle meat and drink, without trespass to any other, and then the cattle must be sustained at the peril of the owner: Or it is a pound *covert* or close, as to impound the cattle in some part of his house; and then the cattle must be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefore. 1 *Inst.* 47.

But if the distress be of utensils of household, or such like dead goods, which may take harm by wet or weather, or be stolen away; there he must impound them in a house, or other pound *covert*, within three miles in the same county; for if he impound them in a pound *overt*, he must answer for them. 1 *Inst.* 47.

2. By 11 G. 2. c. 19. any person distraining, may impound or otherwise secure the distress, of what kind soever it be, in such place, or on such part of the premises,

Impounding on the premises.

as shall be most convenient ; and may appraise, and sell the same, as any person before might have done off the premises. *f. 10.*

Using the goods
distrained.

3. Cattle distrained may not be worked or used, unless for the owner's benefit, as a cow milked, or the like ; much less may they be abused or hurt. *Cro. Jac. 148.*

And it hath been said in this case, that even a cow may not be milked ; for tho' the cow be better for this, yet he who took the distress ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow ; and if it perish by this, yet he who took the distress may distrain again. *2 Bac. Abr. 112.*

Distress dying.

4. So if the distress be lost by the act of god : as if the distress dies in the pound, without any default in the distrainer ; in such case, he who made the distress may distrain again. *1 Salk. 248.*

Killed.

5. It is the distrainer's own fault, if he puts the distress in a pound which will not hold it ; but he cannot justify the tying of cattle in the pound ; and if he ties a beast, and it is strangled, he must pay damages. *1 Salk. 248.*

VIII. Of rescous and pound-breach.

Rescous and
pound breach.

1. By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth against the peace, and doth trespass to the king, and to the lord of the fee, and to the sheriffs, and hundredors, in breach of the peace, and to the party, and to the delaying of justice ; and therefore hue and cry is to be levied against him, as against those who break the peace. *Mir. c. 2. f. 26.* And the party who distrained may take the goods again, wheresoever he shall find them, and impound them again. *1 Inst. 47.*

2. And by statute, on any pound-breach or rescuous, of goods distrained for rent, the person grieved thereby, shall in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to have come to his use or possession. *2 W. sess. 2. c. 5. f. 4.*

Treble damages and costs] In the case of *Sir Wilfred Lawson v. Storey*, *M. 6 W.* It was adjudged, that the costs shall be trebled as well as damages. *L. Raym. 20.*

3. When a man hath taken distress, and the cattle distrained, as he is driving them to the pound, go into the house of the owner ; if he that took the distress demand them

them of the owner, and he deliver them not, this is a rescous in law. 1 *Inst.* 161.

IX. Replevyng the distress.

1. It is worthy of observation, how provident the law Replevy, is, that mens beasts, cattle, or other goods be not unjustly or excessively distrained; and if they be, that deliverance be speedily made of them by replevy: otherwise the husbandry of the realm, and mens other trades, might be overthrown or hindred. 2 *Inst.* 106.

2. To which purpose, it is enacted by the 1 & 2 P. & M. c. 12. that the sheriff of every county shall, at his first county day, or in two months after he hath received his patent of office, appoint four deputies at the least, dwelling not above 12 miles one distant from another, to make replevies; on pain of 5 l. a month, half to the king, and half to him that shall sue in any court of record. *f.* 3.

3. And the sheriff, or other officer having authority to grant replevins, shall in every replevin of a distress for rent, take in his own name, from the plaintiff and two sureties, a bond in double the value of the goods distrained, to be ascertained on the oath of one witness, and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods distrained, in case a return shall be awarded; before any deliverance be made of the distress; and the sheriff shall assign such bond to the *avowant*, or person making *consuance*. 11 G. 2. c. 19. *f.* 23.

Note, *avowry* is, where one takes a distress, and the person distrained sues a replevin; then he that took the distress must *avow* and justify in his plea, for what cause he took it, if he took it in his own right; and this is called an *avowry*: if he took it in the right of another, then, when he hath shewed the cause, he must make *consuance* of the taking, as bailiff or servant to him, in whose right he took it. *Terms of the L.*

X. Sale of the distress.

Distress taken for an offence presented in the leet, may sale. of common right be sold, because it is a court of record; but otherwise it is, of distresses in courts that are not of record. 12 *Mod.* 330.

So a distress for an amercement in a court baron cannot be sold; but in such case a distress infinite shall go. 1 *Bulst.* 52, 53.

In like manner, before the statute of the 2 W. sess. 1. c. 5. distress for rent in arrear could not be sold, but only detained till payment of the rent : But by the said statute it is enacted, that *whereas the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby : therefore from henceforth, where any goods shall be distrained (I) for rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant, or owner of the goods distrained, shall not within five days next after such distress taken, and notice (K) thereof (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises, replevy the same ; in such case the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place, where such distress shall be taken, cause the goods and chattels so distrained to be appraised by two sworn (L) appraisers (whom such sheriff, under-sheriff, or constable shall swear) to appraise (M) the same truly, according to the best of their understandings ; and after such appraisement, shall sell the same for the best price can be gotten for them, for satisfaction of the rent, and charges of the distress, appraisement, and sale ; leaving the overplus (if any) with the sheriff, under-sheriff, or constable, for the owner's use.* 2 W. sess. 1. c. 5. s. 2.

Shall not within five days] *M. 13 G. Griffin and Scott.* Trespass for entering his house, and keeping possession of his goods eight days. The defendant justifies under a distress for rent. But by the court ; The defendant ought to have removed the goods at the five days end ; and for the other three he is a trespasser, and there is no justification. *Str. 717.*

The constable of the hundred, parish, or place, where such distress shall be taken] *T. 7 W. Walter and Rumbald.* The teneement whereupon the distress was made, lay part in the hundred of *Kinasley* in *Wiltshire*, and part in the hundred of *Andover* in the county of *Southampton* ; and part of the distress was taken in *Kinasley*, and part in *Andover* ; and all impounded together in the hundred of *Kinasley* ; and the constable of *Kinasley* administered the oath to the appraisers for the whole, in the presence of the constable of *Andover*. It was objected, that the goods which were taken in *Andover* ought to have been impounded, appraised, and sold in *Andover* ; and that the constable of *Andover*, tho' present in *Kinasley* when the appraisement was made, had no jurif-

jurisdiction there, so that the whole was done solely by the constable of *Kingsey*, which therefore as to the goods taken in *Andover* was void. But by the court; the chasing the distress over into the other county, is a continuance of the taking the distress; and the party, since it was for one intestine cause, cannot sever the distress, but ought to chase them all together, and impound them in one pound. *L. Raym.* 53.

By the 1 & 2 P. & M. c. 12. no person shall take for keeping in pound, or impounding any distress, above 4*d.* for any one whole distress: and where less hath been used, there to take less; on pain of 5*l.* to the party grieved, besides what he shall take above 4*d.* *f.* 2.

XI. Irregularity in the proceedings.

Where any distress shall be made, for any kind of rent Irregularity. justly due, and any irregularity shall be afterwards done by the party distraining, or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party aggrieved may recover satisfaction for the special damage, in an action of trespass or on the case; and if he recover, he shall have full costs. *11 G. 2. c. 19. f. 19.*

But no tenant shall recover on such action, if tender of ~~amends~~ hath been made before the action brought. *f.* 20.

XII. Landlord re-entering on non-payment.

In case where half a year's rent shall be in arrear, and Re-entering. the landlord or lessor hath right by law to re-enter for non-payment thereof; he may, without any formal demand or re-entry, serve a declaration in ejectment; and on recovering judgment and execution, shall hold the premises discharged from the lease. But this not to bar the right of any mortgagee. And if the defendant files a bill in equity, he shall not have an injunction against the proceedings at law, unless he shall bring the arrears into court, and also the costs taxed in the said suit. Provided, that if the tenant shall before the trial in ejectment, pay all the arrears and costs, the proceedings on the ejectment shall thenceforth cease. *4 G. 2. c. 28. f. 2, 3, 4.*

XIII. Case of tenant holding over.

1. If any tenant for life or years, or other person who Holding over shall come into possession by, from, or under him, shall at or after the
VCL. I. F f will expire.

wilfully hold over any lands, after the determination of such term, and after demand made, and notice in writing given for delivering the possession thereof; he shall, for the time that he shall so hold over, pay double the yearly value thereof, to be recovered by action of debt, in any court of record. 4 G. 2. c. 28. §. 1.

But this remedy seemeth not altogether adequate to the evil; for three reasons. 1. Because such action is certainly tedious and expensive. 2. It is uncertain, when the action is over, whether the tenant will be able to pay. 3. What is chiefly wanted, namely, putting the landlord into possession, is not obtained by such action, but for that he shall be still to seek. A more short and easy method of ousting the tenant of his possession, seemeth more eligible in the like cases.

Holding over after having given notice to quit.

2. If any tenant shall give notice of his intention to quit the premises, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time; he shall from thenceforth pay double rent, to be recovered in like manner as the single rent. 11 G. 2. c. 19. §. 18.

This clause also proceedeth upon a supposition, which perhaps may not be true, namely, that the tenant is a man of substance. It is more likely, that if he were able to live elsewhere, he would not chuse to hold over under such circumstances, nor perhaps would the landlord want to be rid of him. The putting him out of possession, by some expeditious and easy method, seemeth the more adequate remedy in this case also, in like manner as is provided in the case where the tenant deserteth the premises, as hereafter followeth.

XIV. Attorning to strangers.

Attorning to strangers.

Whereas the possession of estates is rendred precarious, by tenants attorning to strangers; it is enacted, that all such attornments shall be void; unless the same be made pursuant to some judgment at law or decree in equity, or be with the consent of the landlord, or be to a mortgagee after the mortgage is become forfeited. 11 G. 2. c. 19. §. 11.

And tenants to whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof to the landlord; on pain of forfeiting to him three years value of the rent; and the landlord may make himself defendant by joining with the tenant, or may appear by himself. §. 12, 13.

XV. De-

XV. Deserting the premises.

If any tenant at rack rent, or where the rent reserved shall be full three fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had; two justices (having no interest in the premises) may, at the request of the landlord, go upon and view the same, and affix on the most notorious part of the premises, notice (N) in writing, what day (at the distance of 14 days at the least) they will return to take a second view; and if on such second view, the tenant shall not appear and pay the rent, or there shall not be sufficient distress on the premises, then the justices may put the landlord into possession, and the lease as to such demise shall from thence be void. 11 G. 2. c. 19. *f.* 16.

Tenant desert-
ing.

But the tenant may appeal to the next justice or justices of assize; who may award costs to either party. *f.* 17.

And the justices in this, and all other the like cases, ought to make a record (O) of the whole proceedings, to be produced afterwards in case of an action brought against the landlord by such tenant. For the justices are not to carry witnesses with them about the country, to testify what they shall act as judges of record; nor doth it seem requisite, that they should go and testify in a court upon their oaths, what they shall have acted in such cases; but to make a record in writing under their hands and seals, of all that hath been done: which record being produced in court, seemeth to be the proper evidence in all such cases, for that the law reposeth an intire confidence therein, and it shall not be gainsaid; otherwise there would be no end of things.

XVI. Rent in case of an extent or execution.

In the case of *K. and Cotton, T. 1755*, it was determined by the barons of the exchequer, and affirmed on a writ of error, that if a distress be made for rent, and before the five days given by act of parliament are expired an extent is issued, tho' it be not levied, for a debt due to the crown; the extent shall take place of the distress: because the distress doth not oust the property of the effects into the landlord, but is only a pledge or security in his hands for his rent.

Extent or execu-
tion.

But by the 8 *An. c.* 14. No goods being on any messuage, lands, or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by execution, unless the party, at whose suit the execution is sued out, shall before the removal of such goods from off the premises, pay to the landlord or his bailiff all such rent as shall be then due for the premises, provided that it amount not to more than one year's rent; and if the said arrears shall exceed one year's rent, then the party paying such landlord one year's rent, may proceed to execute his judgment. *f.* 1.

And in case of two executions, there shall not be two years rent paid to the landlord: for the intent of the act was to reserve to the landlord only the rent for one year, and it was his own fault if he let more run in arrear. Therefore one year's rent to the landlord being paid to him on the first execution, the sheriff is not to levy for him again any thing on a subsequent execution. *Str.* 1024.

XVII. Rent on the death of tenant for life.

Tenant for life
dying.

Whereas where any lessor or landlord, having only an estate for life, in the lands, tenements or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion intitled thereto, other than for the use and occupation from the death of the tenant for life; of which, advantage hath often been taken by the under-tenants, who thereby avoid paying any thing for the same: for remedy thereof, where any tenant for life shall happen to die before or on the day, on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of such under tenant, if such tenant for life die on the day on which the same was made payable the whole, or if before such day then a proportion, of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due. 11 G. 2. c. 19. *f.* 15.

In the case of *Pagget and Gee*, Dec. 4. 1753. Tenant in tail, remainder to the defendant in fee, leases for years, and dies without issue a week before the day of payment of the half year's rent. The lessee, at the day, pays all the half year's rent to the defendant. The executor of the tenant in tail brings his bill for apportionment of the rent.———By the lord chancellor *Hardwicke*: This point has never been determined; but this is so strong a case, that I shall make it a precedent. There are in it two grounds for relief in equity. The first arises on the statute of the 11 G. 2. The second arises on the tenant's having submitted to pay the rent to the defendant.———The relief arising upon the statute, is, either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinable estate, died but a day before the rent reserved on a lease of his became due, the rent was lost. For no one was intitled to recover it. His representatives could not; because they could only bring an action for the use and occupation; and that would not lie where there was a lease, but debt or covenant. Nor could the remainder man; because it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy. But there are two descriptions of the person, to whose executors the remedy is given. In the preamble, it is one having only an estate for life. In the enacting part, it is, tenant for life. Now tenant in tail comes expressly within the mischief. I do not know how the judges at common law would construe it: but I should be inclined in this court to extend it to them. I should make no doubt, were this the case of tenant in tail after possibility of issue extinct; for he is considered in many respects as tenant for life only. He cannot suffer a recovery. He may be enjoined from committing waste, such as hurts the inheritance, as felling timber; though not for committing common waste, being considered as to that as tenant in tail. Were it the case of tenant for years determinable on lives, he certainly must be included within the act, tho' it says only tenant for life: It would be playing with the words to say otherwise. These cases shew the necessity of construing this act beyond the words. Tenant in tail has certainly a larger estate than a mere tenant for life; for he has the inheritance in him, and may when he pleases turn it into a fee: but if he does not; at the instant of his death he has but an interest for life.

Such too is the case of a wife tenant in tail *ex provisione mariti*. Upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this, *equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to the reasons of acts of parliament? Nay, it has actually done so, on the statute of forcible entry; upon which, this court grounds bills, not only to remove the force, but to quiet the possession. That act requires a legal estate in possession. This court extends the reason to equitable interest.———But I ground my opinion in this case, upon the tenant's having submitted to pay the rent. He has held himself bound in conscience to pay it, for the use and occupation of the land the last half year. He paid it to the defendant, which he was not bound to do in law. And in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity intitled to it. The division must be that prescribed by the statute; and then the plaintiff is intitled to such a proportion of the rent as accrued during the testator's life.——And accordingly it was decreed.

XVIII. Rent how far recoverable by executors or administrators.

Rent recoverable
by executors or
administrators.

By the 32 H. 8. c. 37. Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, fee tail, and for term of life, of rents services, rent charges, rent secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due to their testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have action to levy the same; it is enacted, that the executors and administrators of every such person to whom any such rent or fee farm shall be due and not paid at the time of his death, may have an action of debt for the same, against the tenant who ought to have paid the same, or against his executors and administrators; or may distrain upon the premises, so long as they continue in the possession of such tenant in demesne who ought immediately to have paid the same to the testator in his life, or of any other person claiming the same only from or by such tenant by purchase, gift, or descent. *f. 1.*

In

In like manner the husband may have action, or distrain for arrears due in the life time and in the right of his wife. *f. 3.*

And if any person shall have any rents or fee farms for the life of any other person, which shall be behind and unpaid at the death of such other person; he, his executors or administrators, may have action of debt against the tenant in demesne that ought to have paid the same when it was first due, his executors and administrators, or may distrain for the same upon the premises, in such like manner as he might have done, if the person by whose death the estate was determined had been in full life. *f. 4.*

Note, *fee farm* is, when the lord, upon the creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or at least a fourth part of the value; without homage, fealty, or other services, beyond what are especially comprized in the feoffment: and it is called a *fee farm rent*, because a farm rent is reserved upon a grant in fee. *2 Inst. 44.*

XIX. Of distress by warrant of justices of the peace.

By the 27 G. 2. c. 20. It is enacted as follows: *In all cases where any justice of the peace is or shall be required or empowered by any act of parliament, to issue a warrant of distress, for the levying of any penalty inflicted, or any sum of money directed to be paid by such act; it shall be lawful for the justice granting such warrant, therein to order and direct the goods and chattels so to be distrained, to be sold and disposed of within a certain time to be limited in such warrant, so as such time be not less than four days, nor more than eight days, unless the penalty or sum of money for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, be sooner paid.*

And the officer making such distress, shall and may deduct the reasonable charges of taking, keeping, and selling such distress, out of the money arising by such sale; and the overplus (if any) after such charges, and also the said penalty or sum of money, shall be satisfied and paid, shall be returned on demand, to the owner of the goods so distrained: and the officer executing such warrant, if required, shall shew the same to the person whose goods are distrained, and shall suffer a copy thereof to be taken.

But this shall not extend, to alter any provisions relating to distresses to be made for the payment of tithes and church rates by the people called quakers, contained in the acts of the 7 & 8 W. c. 34. and the 1 G. 1. c. 6.

Officer may deduct the reasonable charges] But here is no power given to the justices, to ascertain such charges, therefore it seemeth, that the officer executing the warrant shall be the sole judge thereof in the first instance, and afterwards, if the owner of the goods distrained shall be dissatisfied, the reasonableness thereof shall be determined by a judge and jury upon an action brought.

But by special statutes, this power of ascertaining the charges of distress and sale, is sometimes given to the justices, as is set forth in this book under the respective titles.

Tithes and church rates by the people called quakers] The abovesaid statutes of the 7 & 8 W. c. 34. and 1 G. 2. c. 6. relate not only to *tithes* and *church rates* (by which last seemeth only to be understood the churchwardens rate for the repair and other uses of the church), but also to any customary or other rights, dues, or payments, belonging to any church or chapel, which of right by law and custom ought to be paid for the stipend or maintenance of any minister or curate officiating in any church or chapel. Therefore for any thing that appears from the words of this statute, unless it be in the case of *tithes* or *church rates*, the justices may order the distress for those other dues and payments to be detained for a certain time, and the officer may deduct the charges not only of *distraining*, but also of *keeping* and *selling* the distress; whereas by those former acts above mentioned, the officer was only allowed to deduct the necessary charges of *distraining*.

THE eight precedents next following, drawn and communicated to the author by a gentleman of great learning and judgment, acting in the commission of the peace*, are inserted, not only as useful in this place, but as excellent patterns for our imitation in all other like cases.

A. Complaint to be exhibited in writing before two justices, in the case of goods clandestinely removed; on the 11 G. 2. c. 19.

Westmorland. **B**E it remembered, that this ——— day of ——— A. D. of ——— complaineth, that A. O. of ——— hath fraudulently and clandestinely removed and conveyed away certain goods and chattels of ——— not exceeding

* The late Sir Thomas Douy, Baronet.

ceeding the value of 50 l. from ——— at ——— to prevent
 ——— from distraining the said goods and chattels for arrears
 of rent due to the said ——— for the said ——— And that
 B. O. of ——— yeoman, and C. O. of ——— yeoman, wil-
 fully and knowingly aided and assisted the said A. O. in so
 fraudulently and clandestinely removing and conveying away the
 said goods and chattels, and in concealing the same.

Exhibited at ——— the ——— day of ——— A. I.
 before us ——— justices of the peace
 of ——— residing near ——— not being
 interested in ———.

B. Warrant thereupon to summon the parties con-
 cerned.

Westmorland. { To the constable of ———, &c.

WHEREAS a complaint in writing hath been this ———
 day of ——— exhibited at ——— before us ———
 justices of the peace of ——— residing near ——— not being
 interested in ——— by A. I. of ——— gentleman, setting forth
 that A. O. of ——— yeoman, hath fraudulently and clandes-
 tinely removed and conveyed away certain goods and chattels
 of ———, not exceeding the value of 50 l. from ——— to pre-
 vent ——— from distraining the said goods and chattels, for
 arrears of rent due to the said ——— for the said ——— And
 that B. O. of ——— yeoman, and C. O. of ——— yeoman,
 wilfully and knowingly aided and assisted the said ——— in so
 fraudulently and clandestinely removing and conveying away the
 said goods and chattels, and in concealing the same: These are
 therefore to command you, and each and every of you, forth-
 with to summon the said A. O. B. O. and C. O. to appear
 before us at ——— on the ——— day of ———, at the hour
 of ——— to answer the matter of the said complaint. Given
 under our hands and seals at ——— the ——— day of ———.

C. Order of two justices thereupon.

Westmorland. { The order and adjudication of ——— and
 ——— justices of the peace of ———.

WHEREAS A. O. of ——— yeoman, hath been duly
 charged before us ——— and ——— justices of the
 peace of ——— residing near ——— not being interested in
 ——— with having fraudulently and clandestinely removed
 and

Distress.

and conveyed away certain goods and chattels of——not exceeding the value of 50*l.* from——to prevent the said——from distraining the said goods and chattels, for arrears of rent due to the said——for the said——; And whereas B. O. of——yeoman, and C. O. of——yeoman, have been also duly charged before us, with having wilfully and knowingly aided and assisted the said——in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same; And we the said justices having summoned the parties concerned, and examined the fact, and all proper witnesses upon oath, [or in case of a quaker, upon affirmation required by law,] And it appearing and being fully proved before us, that the said A. O. did so fraudulently and clandestinely remove and convey away, as aforesaid,——being of the value of——and the goods and chattels of the said——, And it also appearing and being fully proved before us, that the said B. O. and C. O. wilfully and knowingly aided and assisted the said A. O. in so removing and conveying away, as aforesaid, the said——and in concealing the same: We the said justices do therefore this——day of——determine and adjudge that the said A. O. B. O. and C. O. are guilty of the offences, with which they the said A. O. B. O. and C. O. are charged as aforesaid, and they are convicted thereof; And we do hereby order and adjudge them the said A. O. B. O. and C. O. to pay the sum of——being double the value of the said goods and chattels, to——or to his bailiff, servant or agent, on or before the——day of——. Given under our hands and seals at——the——day of——.

- D. Warrant of distress, in case the offenders, having notice, refuse or neglect to pay, pursuant to the preceding order. 11 G. 2. c. 19.
27 G. 2. c. 20.

Westmorland. { To the constable of ——&c.

WHEREAS A. O. of——yeoman, B. O. of——yeoman, and C. O. of——yeoman, were by an order dated the——day of——under the hands and seals of us——and——justices of the peace of——residing near——not being interested in——ordered to pay the sum of——to——or his bailiff, servant, or agent, on or before the——day of——being double the value of certain goods and chattels of the said——which the said A. O. was before us duly convicted

convicted of having fraudulently and clandestinely removed and conveyed away from——to prevent the said ——from distraining the said goods and chattels for arrears of rent due to the said——for the said——and which the said B. O. and C. O. were also duly convicted before us, of having wilfully and knowingly aided and assisted the said A. O. in so fraudulently and clandestinely removing and conveying away, and in concealing the same; And whereas the said A. O. B. O. and C. O. having notice of our said order, have refused or neglected to pay, and have not paid, the said sum of——pursuant therunto, and the same hath been fully proved before us; These are therefore to command you, and each and every of you, to levy the said sum of——by distress and sale of the goods and chattels of the said A. O. B. O. and C. O. and we do hereby order and direct the goods and chattels so to be distrained, to be sold and disposed of, within——days, unless the said sum of——for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid: And you are also hereby commanded to certify to us, what you shall do by virtue of this our warrant. Given under our hands and seals at——the ——day of——.

E. The constable's return thereupon of the want of distress.

Westmorland. **I** A. C. constable of——do hereby certify——and——justices of the peace of——that I have made diligent search for, but do not know of, nor can find, any goods and chattels of——and——and——or of any of them, by distress and sale whereof I may levy the sum of——pursuant to their warrant for that purpose dated the——day of——. Given under my hand this——day of——.

F. Commitment thereupon to the house of correction.

Westmorland. **{** To the constable of——&c. and also to the keeper of the house of correction at——.

WHEREAS——and——and——were by an order dated the——day of——under the hands and seals of us——justices of the peace of——residing near——not being interested in——ordered to pay the sum of——to——or to his bailiff, servant,
or

or agent, on or before the——day of——being double the value of certain goods and chattels of the said——which the said——was before us duly convicted of having fraudulently and clandestinely removed and conveyed away from——to prevent the said——from distraining the said goods and chattels, for arrears of rent due to the said——for the said——And which the said——and——were also duly convicted before us of having wilfully and knowingly aided and assisted the said——in so fraudulently and clandestinely removing and conveying away, and in concealing the same; And whereas the said——and——and——having notice of our said order, have refused or neglected to pay, and have not paid, the said sum of——pursuant thereunto, and the same hath been duly proved before us; And whereas it appears to us, by the return of——constable of——dated the——day of——that he hath made diligent search for, but doth not know of, nor can find, any goods and chattels of the said——and——and——or any of them, by distress and sale whereof the said sum of——may be levied, pursuant to our warrant duly made and issued for the levying the said sum of——by distress and sale of the goods and chattels of the said——and——and——: These are therefore to command you the said constable of——&c. and each and every of you, to apprehend the said——and——and——and convey them to the said house of correction at——aforesaid, and deliver them there to the said keeper of the said house of correction; And these are also to command you the said keeper of the said house of correction, to receive them the said——and——and——into the said house of correction, and there keep them to hard labour, without bail or mainprize, for the space of six months, unless the said sum of——so ordered to be paid as aforesaid, shall be sooner satisfied. Given under our hands and seals at——the——day of——

- G. Form of a complaint and oath to be made before a justice, in case of a dwelling house, where goods and chattels are fraudulently and clandestinely removed and conveyed away and secured, so as to prevent them from being taken and seized as a distress for arrears of rent.

Westmorland. **B**E it remembered, that this——day of——A. I. of——yeoman, complainant and maker oath, that certain goods and chattels of
A. O.

A. O. of———yeoman, have been fraudulently and clandestinely conveyed and carried away from———by the said A. O. his servant or servants, agent or agents, or other person or persons, aiding or assisting therein, to prevent———from distraining the said goods and chattels for arrears of rent due to the said———for the said———; And that the said goods and chattels are put, placed, or kept, in the house, barn, stable, outhouse, yard, close or other place of———at———locked up, fastened, or otherwise secured, so as to prevent the said goods and chattels from being taken and seized as a distress for arrears of rent; And that the said A. I. hath a reasonable ground to suspect, and doth suspect, that the said goods and chattels are in the dwelling house of the said———at———

A. I.

Taken and sworn at———the———
day of———before———

H. Warrant upon the preceding complaint and oath.

Westmorland. { To the constable, headborough, borsholder, or other peace officer of———and to each, and every of them.

WHEREAS A. I. of———yeoman, hath this———day of———exhibited his complaint and made oath before———justice of the peace of———that certain goods and chattels of A. O. of———yeoman, hath been fraudulently and clandestinely conveyed and carried away from———by the said A. O. his servant or servants, agent or agents, or other person or persons aiding or assisting therein, to prevent———from distraining the said goods and chattels for arrears of rent due to the said———for the said———; And that the said goods and chattels are put, placed, or kept in the house, barn, stable, outhouse, yard, close, or other place of———at———locked up, fastened, or otherwise secured, so as to prevent the said goods and chattels from being taken and seized as a distress for arrears of rent; and that the said A. I. hath a reasonable ground to suspect, and doth suspect, that the said goods and chattels are in the dwelling house of———at———: These are therefore to command you, and each and every of you, to aid and assist———his steward, bailiff, receiver or other person or persons empowered to take and seize, as a distress for rent, the said goods and chattels, in the day time; to break open and enter into the said dwelling house, barn, stable, outhouse, yard,
do,

close, or other place of the said—at—and to take and seize the said goods and chattels for the said arrears of rent, according to law. Given under my hand and seal at—the—day of—

I. The form of the inventory of the goods distrained may be this.

AN inventory of the several goods and chattels, distrained by us whose names are underwritten, the—day of—in the year—in the houses, outhouses, and lands, of A. T. in—by the authority and on the behalf of A. L. of—for—pounds arrear of rent due to him the said A. L. In the dwelling house:

One table,

Six chairs, &c.

In the cow house:

Six cows,

Two calves, &c.

K. Notice.

A. T.

TAKE notice, that by the authority and on the behalf of your landlord A. L. I have this—day of—in the year of our lord—distrained the several goods and chattels specified in the schedule hereunto annexed, in your houses, outhouses, and grounds, at—for—pounds arrear of rent due to him the said A. L. And if you shall not pay the said rent so due and in arrear as aforesaid, or replevy the said goods and chattels, I shall after the expiration of five days from the date hereof, cause the said goods and chattels to be appraised and sold, according to the statute in that case made and provided. Given under my hand the day and year first above written.

A. D.

Witness that a copy hereof was this day delivered to the said A. T. (Or, left at the chief mansion house of the said A. T.)

A. W.

L. Appraisers oath.

YOU and each of you shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your understanding: So help you god.

M. Form of the Appraisment.

THE appraisment may be in the form of the inventory, specifying the particulars, and their respective valuations: And then add at the end,

Appraised by us, this——day of——in the year——

A. P. }
B. P. } sworn appraisers.

N. Notice to be affixed on the premises being deserted.

Abraham Sutcliffe,

TAKE notice, that upon the complaint of Eleanor Ashton of Underley in the county of Westmorland, widow, made unto us John More, esquire, and Richard Burn, clerk, two of his majesty's justices of the peace for the said county, that you the said Abraham Sutcliffe have deserted the messuage and tenement called——consisting of——situate, lying, and being at Underley aforesaid, in the county aforesaid, unto you demised at rack rent by her the said Eleanor Ashton, and that there is in arrear and due from you the said A. S. unto her the said E. A. one whole year's rent for the said demised premises, and that you have left the said premises uncultivated and unoccupied, so that no sufficient distress can be had, to countervail the said arrears of rent; we the said justices, (having no interest, nor either of us having any interest, in the said demised premises) on the said complaint as aforesaid, and at the request of her the said E. A. have this day come upon and viewed the said demised premises, and do find the said complaint to be true; and on the 28th day of this present month of February we will return to take a second view thereof, and if upon such second view, you, or some person on your behalf, shall not appear and pay the said rent in arrear, or there shall not be sufficient distress on the said premises, then we the said justices will put her the said E. A. into the possession of the said demised premises, according to the form of the statute in such case made and provided. In witness whereof we have hereunto set our hands and seals, and have caused this notice to be affixed on the out door of the mansion house, the same being the most notorious part of the said premises, this fourth day of February in the 27th year of the reign of our sovereign lord George the second of Great Britain, France, and Ireland, king.

O. Record

O. Record of putting the landlord into possession.

Westmorland. **B**E it remembered, that on the fourth day of February in the 27th year of the reign of our sovereign lord George the second of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at Underley in the said county, Eleanor Ashton of Underley aforesaid, in the county aforesaid, widow, complained unto us John Moore, esquire, and Richard Burn, clerk, two of the justices of our said lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, That she the said Eleanor Ashton did demise at rack rent unto Abraham Sutcliffe of——yeoman, the messuage and tenement called——consisting of——situate, lying, and being at Underley aforesaid, in the county aforesaid; and that on the said fourth day of February in the year aforesaid, there was in arrear and due unto her the said E. A. from him the said A. S. tenant of the said demised premises, one whole year's rent thereof; and that he the said A. S. had deserted the said demised premises, and left the same uncultivated and unoccupied, so as no sufficient distress could be had to countervail the said arrears of rent: whereupon the said E. A. then and there, to wit, on the said fourth day of February in the year aforesaid, at Underley aforesaid, in the county aforesaid, requested of us so as aforesaid being justices, to her in this behalf that a due remedy should be provided, according to the form of the statute in that case made. Which complaint and request by us the aforesaid justices being heard, we the said John Moore, esquire, and Richard Burn, clerk, justices aforesaid (having no interest, nor either of us having any interest, in the said demised premises) on the said fourth day of February in the year aforesaid, at Underley aforesaid, in the county aforesaid, did personally go upon and view the said demised premises, and then and there upon our own proper view did find the said complaint to be true, and did then and there affix on the most notorious part of the said demised premises, to wit, upon the out door of the mansion house aforesaid, a notice in writing under our hands and seals, that we the said justices, on the 28th day of the same month of February in the year aforesaid, would return to take a second view thereof. Upon which said 28th day of February in the 27th year aforesaid of our said sovereign lord, we the said justices do now return, come upon, and take a second view of the premises aforesaid, and there upon our own proper view do find, that he

the

the said Abraham Sutcliffe doth not appear, nor any person in his behalf doth appear, and pay the said rent in arrear, and that there is no sufficient distress upon the premises aforesaid, nor upon any part thereof, to countervail the said arrears of rent. Therefore we the said justices, at Underley aforesaid, in the county aforesaid, on the 28th day of February aforesaid in the year aforesaid, do put the said Eleanor Ashton into the possession of the said demised premises, according to the form of the statute aforesaid. In witness whereof we the said justices, unto this record do set our seals, at Underley aforesaid in the county aforesaid, on the said 28th day of February in the 27th year aforesaid of the reign of our said sovereign lord George the second of Great Britain, France, and Ireland, king.

Distringas. See **Process.**

Divine Service. See **Publick Worship.**

Dogs. See **Game.**

Dogs mischievous. See **Misance.**

Door breaking open. See **Arrest.**

Dower. See **Forfeiture.**

Drover of cattle. See **Badger.**

Drunkenness. See **Alehouses.**

Duelling. See **Homicide.**

Dyers. See **Woollen Manufacture.**

Eggs. See **Game.**

Egyptians. See **Vagrants.**

Embracery. See **Maintenance.**

Escape.

THIS is to be understood of escapes in *criminal* cases; and not in *civil* cases, as for debt, or the like.

Escape, what.

An escape is, where one that is arrested gaineth his liberty, before he is delivered by course of law. *Terms de la ley.*

Several kinds thereof.

Escapes are of three kinds. 1. By a person who hath the offender in his custody; this is properly called an *escape*. 2. Caused by a stranger; this is commonly called a *rescue*. 3. By the party himself; either without force, which is simply an escape, or with force, which is *prison breaking*. *Rescous* and *prison breaking* are treated of under their respective titles; and this title treats only of escapes properly so called. Concerning which we will treat in the following order:

- I. Of escape by the party himself.*
- II. Escape suffered by a private person.*
- III. Escape suffered by an officer.*
- IV. What is a voluntary, and what a negligent escape.*
- V. Concerning the retaking of a person escaped.*
- VI. Indictment for an escape.*
- VII. Trial and conviction for an escape.*
- VIII. Punishment of an escape.*
- IX. Aiding in attempting to escape.*

I. Of escape by the party himself.

Escape by the party himself.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. 2 *Haw. 122.*

But escape committed by the party himself, belongs more properly to the title *Prison breaking*.

II. Escape suffered by a private person.

Escape by a private person

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some other who by law ought to have the custody of him. 2 *Haw. 138.*

And

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. 2 Haw. 138.

III. Escape suffered by an officer.

1. In order to make it an escape, there must be an actual arrest; and therefore if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 Haw. 129.

Escape by an officer.

There must be a previous arrest.

2. And as there must be an actual arrest, such arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 2 Haw. 129.

And justifiable.

3. And as the imprisonment must be justifiable, so it must be also for a criminal offence. 2 Haw. 129.

And for a criminal offence.

4. Also if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were, that *he be discharged paying his fees*, so that till they be paid, the first imprisonment continued lawful as before; for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor: Yet if a person convicted of a crime, be condemned to imprisonment for a certain time, and also *till he pay his fees*, and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid; but it seems, that this is to be intended where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the nonpayment of a debt in his power to release. 2 Haw. 129, 130.

And not detained only for fees.

5. Also, it is an escape in some cases, to suffer a prisoner to have greater liberty, than by the law he ought to have; as to admit a person to bail, who by law ought not to be bailed, but to be kept in close custody. 2 Haw. 130.

Too much liberty, an escape.

So if a gaoler, or other officer, shall license his prisoner to go abroad for a time, and to come again; this is an escape, because the prisoner is found out of the bounds of

his prison, tho' the prisoner return again, according as he shall be prescribed. *Dalt. c. 159.*

Losing sight, and
escape.

6. If the gaoler so closely pursues the prisoner who flies from him, that he retakes him, without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. And if he kill him in the pursuit, he is in like manner guilty of an escape, tho' he never lost sight of him, and could not otherwise take him, not only because the king loses the benefit he might have had by the forfeiture on his attainder, but also because the publick justice is not so well satisfied by the killing him in such an extrajudicial manner. *2 Haw. 130.*

IV. What is a voluntary, and what a negligent escape.

Voluntary
escape, what.

1. Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is a voluntary escape. *2 Haw. 130.*

Negligent
escape, what.

2. A negligent escape is, when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again, before he hath lost the sight of him. *Dalt. c. 159.*

Suffering a pri-
soner to kill
himself.

3. If the constable or other officer, shall voluntarily suffer a thief, being in his custody to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief: Otherwise if the thief shall suddenly without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. *Dalt. c. 159.*

V. Concerning the retaking of a person escaped.

Let go voluntar-
ily, cannot be
retaken.

1. If an officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go; the officer cannot after arrest or take him again by force of his former warrant, for that this was by the consent of the officer: But if he return, and put himself again under the custody of the officer, it seems that it may be probably argued, that the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. *Dalt. c. 169. 1 Haw. 81.*

2. But

2. But if the party arrested had escaped of his own ^{Fresh suit.} wrong, without the consent of the officer, now upon fresh suit, the officer may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town or county, and bring him before the justice upon whose warrant he was first arrested. *Dalt. c. 169.*

And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. *2 Haw. 131, 132.*

3. And wherever a person is lawfully arrested for any ^{Breaking open doors to retake,} cause, and afterwards escapes, and shelters him in an house, the doors may be broke open to take him, on refusal of admittance. *2 Haw. 87.*

4. It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power, that the keeper loses sight of him, the keeper is punishable for the escape, notwithstanding he retook him immediately after: And it is clear, that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, tho' he could not possibly retake him; but must in such case be content to submit to such punishment, as his negligence shall appear to deserve. *2 Haw. 132.*

VI. Indictment for an escape.

It seems clear, that every indictment (A) for an escape, ^{Indictments.} whether negligent or voluntary, must expressly shew, that the prisoner was actually in the defendant's custody for such a crime; and that he went at large: And if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large; and must set forth, not the felony in general, but the particular kind of felony: But it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; for that it is not material in this case, whether the person who escaped were guilty or not. *2 Haw. 133, 229.*

VII. Trial and conviction for an escape.

1. If the prisoner be of record in a court, and the gaoler ^{Gaoler not being called,} being called, cannot give an account where he is, this is ^{indictment} a

a conviction of an escape; but seems not a conviction of a voluntary escape, unless the gaoler confesseth it: And the gaoler may be fined in such a case; but not convicted of felony, without indictment or presentment. 1 *H. H.* 599, 603.

Felony to be tried before the escape.

2. And it seems to be clear, that a keeper who voluntarily suffers another to escape, who was in his custody for felony, cannot be arraigned for such escape as for felony, until the principal be attainted, for that the felony of the prisoner shall not be tried between the king and the keeper, because the prisoner is a stranger thereunto; yet he may be indicted and tried for it as a misprision, before the attainder of the principal offender. 2 *Haw.* 135. 2 *Iust.* 591, 592.

VIII. Punishment of an escape.

Punishment of escape before arrest.

1. If a felon escapes before arrest, it is not punishable in him as felony; but for the flight he forfeits his goods when presented. *Hale's Pl.* 111.

Of escape by a private person.

2. If a private person arrest a felon, and he escape by force from him, the township shall be amerced, but it seems it excuseth the party, because he cannot raise power to assist him; but if a constable or other officer, hath the custody of a prisoner, bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 *H. H.* 601.

Of a negligent escape.

3. Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 2 *Haw.* 136, 139. 1 *H. H.* 600, 604.

And it seems to be the better opinion, that a sheriff is as much liable to answer for a negligent escape suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw.* 135.

Note; Mr. *Hawkins*, altho' he is one of the most accurate of all writers, yet hath inserted in this place certain penalties for escapes, which were expired above 200 years before. 2 *Haw.* 137.

If a prisoner for felony break the gaol, this seems to be a negligent escape in the gaoler, because there wanted either that due strength in the gaol, that should have secured him, or that due vigilance in the gaoler or his officers to have

have prevented it; and therefore it is lawful for the gaoler to hamper them with irons to prevent their escape; for if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 *H. H.* 601.

4. It seems to be generally agreed, that a voluntary escape suffered by an officer, amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass. 2 *Harv.*

134.

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt. c.* 159.

Also, a voluntary escape suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner, as if he was never so rightfully intitled to such custody; for that the crime is in both cases of the same ill consequence to the publick: and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one. 2 *Harv.* 134.

But it seemeth to be clear, that no one is punishable as for felony, for the voluntary escape of a felon, but the person only who is actually guilty of it; and therefore that the principal gaoler is only fineable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. 2 *Harv.* 135.

And therefore, altho' in all civil causes, the sheriff is to be responsible, or the gaoler, at election, yet if the gaoler do voluntarily suffer a felon in his custody to escape; this, inasmuch as it reacheth to life, is felony only in the gaoler, that was immediately trusted with the custody, and not in the sheriff. 1 *H. H.* 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho' it were such in the gaoler, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his gaoler. 1 *H. H.* 597, 598.

But altho' the felony for which a man is committed, be not within clergy; yet the person who voluntarily suffers him to escape, shall have the benefit of clergy. 1 *H. H.* 599.

IX. *Aiding in attempting to escape.*

Aiding in attempting to escape.

By the 16 G. 2. c. 31. If any person shall assist any prisoner to *attempt* his escape from any gaol, though no escape be actually made, if such prisoner was then attainted or convicted of treason or felony (except petty larceny) or lawfully committed to, or detained in any gaol, for treason or felony (except petty larceny) expressed in the warrant of commitment; he shall be guilty of felony, and be transported for seven years: And if such prisoner was then convicted of, or detained in gaol for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment, or was then in gaol for debt amounting to 100 l. he shall be guilty of a misdemeanor, and be liable to fine and imprisonment.

And if any person shall convey, or cause to be conveyed, any *disguise, instrument, or arms*, to any prisoner in gaol, or to any other person there for his use, without consent of the keeper; such person, although *no escape or attempt* be actually made, shall be deemed to have delivered such disguise, instrument or arms, with an intent to assist such prisoner to escape or attempt to escape; and if such prisoner then was attainted or convicted of treason or felony (except petty larceny), or lawfully detained in gaol, for treason or felony (except petty larceny) expressed in the warrant of commitment;---he shall be guilty of felony, and be transported for seven years: But if the prisoner was then convicted or detained for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment, or for debt amounting to 100 l. he shall be guilty of a misdemeanor, and liable to fine and imprisonment.

And if any person shall assist any prisoner to attempt to escape *from any constable*, or other person, who shall have the lawful charge of him, in order to carry him to gaol, by virtue of a warrant of commitment for treason or felony, (except petty larceny); or if any person shall assist any felon to attempt his escape from on board any *boat or vessel carrying felons for transportation*, or from the *contractor* for the transportation of such felons, or his agents, he shall be guilty of felony, and be transported for seven years.

All prosecutions on this act to be commenced within a year after the offence committed.

A. Indictment against a constable for an escape.

Westmorland. **T**HE jurors for our lord the king upon their oath present, That on the — day of — in the — year of the reign of — at — in the county aforesaid, one A. I. of — came before J. P. esquire, then and yet one of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; and the said A. I. did, then and there, on his oath, before the same justice, charge, accuse, and give information against one A. O. of — aforesaid in the county aforesaid, yeoman, for a certain misdemeanor, in taking fish out of the pond of — at — in the said county [or, as the offence shall be:] Whereupon he the said J. P. the justice aforesaid, did then and there, to wit, at — aforesaid, in the county aforesaid, make a certain warrant, under his hand and seal, in due form of law, directed to the constable of — aforesaid, in the county aforesaid, thereby requiring him the said constable to take the body of the said A. O. and bring him before the said J. P. the justice aforesaid, to answer to such matters and things as should be alledged against him, touching the said misdemeanor; Which said warrant, afterwards, to wit, on the same day and year abovementioned, at — aforesaid, in the county aforesaid, was delivered to one A. C. then being constable of — aforesaid, in due form of law, to be executed; by virtue of which said warrant the said A. C. afterwards, to wit, on the said — day of — in the year aforesaid, at — aforesaid, in the said county, did take and arrest the body of the said A. O. and him the said A. O. in his custody for the cause aforesaid, had: Nevertheless, the said A. C. of — aforesaid, in the county aforesaid, yeoman, afterward, to wit, on the said — day of — in the year aforesaid, the duty of his office in that part not regarding, at — aforesaid, in the county aforesaid, unlawfully and negligently did permit the said A. O. to escape, and go at large, out of the custody of him the said A. C. to the great hindrance of justice, in contempt of our said lord the king, and of his laws, and against the peace of our said lord the king, his crown and dignity.

Escheat. See Forfeiture.

Erray.

Estray.

And herein also of goods *waived*.

Estray, what.

1. **E**STRAY is, *where any horses, sheep, hogs, beasts, or swans, do come into a lordship, and are not owned by any man.* Kitch. 23.

Where any horses, sheep, hogs, beasts, or swans] Bees, and other creatures of a wild nature, are not within this description, and therefore not to be reckoned amongst stray goods: nevertheless it seemeth that a swarm of bees, of which the owner hath lost sight, and consequently can make out no property, may be seized for the use of the king, or of the lord of the manor; for it is a maxim of the common law, that such goods whereof no one can claim property do belong to the king; and that which the king hath he may grant to another, and consequently another may prescribe to have the same, within such a precinct or lordship. And therefore it is said, that if any take honey or swarms of bees within the demesnes of the lord, it is inquirable in the court baron. Kitch. 114.

Swans] Swans that be unmarked and wild (being at large and abroad) may be seized by the sheriff for the use of the king, by his prerogative. Dalt. Sher. 80.

Also swans marked and tame may be estrays. Kitch. 80. But it seemeth that no other fowl can be estray. Wood b. 2. c. 2.

Do come into a lordship] That is, where the goods have no right to be; and therefore an estray cannot be in such place, where the party hath a right of common. Dalt. Sher. 79.

And are not owned by any man] Whereupon (as hath been said) the property accrueth to the king; and the cattle of the king cannot be estrays, nor forfeited as such to the lord of the manor. Kitch. 81.

Waif, what.

2. Waif is, where a felon in pursuit waiveth the goods; or where the felon, for fear of being apprehended, thinking that a pursuit was made, having them with him in his possession, fleeth, and waiveth, casteth away, or goeth from the goods: in these cases, they shall be said to be waived in law. But if he hath not the goods with him, when he fleeth being pursued, or for fear to be apprehended, they are not waived nor forfeited, but the owner may take them when he will, without any fresh suit. 5 Co. 109. Dalt. Sher. 78.

But

But if the thief in his flight waive them, there the goods are forfeited to the king or lord of the liberty by the common law, if the felon upon fresh suit was not attainted at the suit of the owner of the goods: And the reason why waif is given to the king, and that the party shall lose his property in such case, is for default in the owner, that he pursued not freshly to apprehend the felon; for it concerneth the publick that crimes do not remain unpunished, and impunity always encourageth to that which is worse. And therefore the law hath imposed this penalty upon the owner, that if the thief by his industry and fresh suit be not attainted at his suit, in an appeal of the same felony, he shall lose for his default all his goods which the thief at the time of his flight waived: But if the thief had them not with him when he fled, having peradventure hid them, there no default can be in the party; and therefore they shall not be forfeited, for if he maketh fresh suit after notice of the felony it sufficeth. *5 Co. 109.*

3. Heretofore waifs and strays were the finder's, by the law of nature; and afterwards the king's, by the law of nations. *Dalt. Sher. 79.* Seizure thereof by the lord.

Thus, one as a bailiff or servant to the sheriff seized a horse as an estray to the king's use, and proclaimed him according to law, and after the year and day sold him, and the sheriff accounted for him in the exchequer. *Dalt. Sher. 80.*

But now kings have granted this, and such like prerogatives, unto their subjects, within their liberties; so that waifs and strays are in many places the lord's of the franchise where they are found. *Dalt. Sher. 79.*

And therefore waived goods and estrays shall be seized by the officer of the king, to the use of the king; or by the officer or bailiff of the lord, who hath such things by grant of the king, or by prescription, to the use of the lord. *Dalt. Sher. 80.*

But if one have a waif, and it be taken out of his manor, he shall have *trespass* without seizing, and though he do not seize it. *Kitch. 81.*

4. It seemeth to be agreed, that waifs and strays ought to be proclaimed in the two next market towns; and that if they are not proclaimed, the owner may take the stray goods again at any time: And it seemeth to be the general tenor of the old books, that they ought also to be proclaimed in the church: Which course it seemeth best to follow; to the end that the owner, who in this case is no wrong doer, may have a reasonable mean to come at his goods again; that is to say, that the goods be proclaimed

at the least thrice, to wit, in the two market towns next adjoining to the place where they strayed, on the market days respectively, and at the church door on a Sunday, as the people come out of the church. *Kitch.* 23, 81, 105. *Dalt. Sher.* 79. *Cro. Eliz.* 716.

How waifs or
strays are to be
kept.

5. And they ought to be wreathed; and to be put in some several ground into an open place, and not in any covert or wood, that the owner may have a view of them; for if they be in covert, the property is not changed, tho' they be there a year and a day. *Kitch.* 23.

An estray is not to be used in any manner, except in case of necessity, as to milk a cow, or the like; but not to ride an horse, for within the year and day he hath not any property in him. *Cro. Jac.* 147, 8.

Owner claiming.

6. He who taketh an *estrays*, may keep it until he be satisfied for the finding, keeping, and proclaiming thereof. *Dalt. Sher.* 79.

But the owner (if it be within the year and day) may take it without telling any marks, or making any proof of property; but this may be done upon the trial, if contested. 2 *Salk.* 686.

And the lord ought to make a demand of what the amends should be; and then if the party thinks the demand unreasonable, he may tender sufficient amends; and if the lord shall not accept it, this shall be settled by the jury upon trial.

But it is sufficient in this case to tender amends *generally*, without expressing any certain sum. For there is a difference between this case, and that of a tender of amends for trespass. In that of a trespass, if the defendant pleads a tender of amends, he must shew what he tendered; for he must tender a certain sum. And the law puts this difficulty upon him, because he is the wrong doer: But the owner of the stray (as hath been said) is no wrong doer; and it is impossible he should know, how long his beast hath been in the lord's custody, nor how much will make a proper satisfaction. 2 *Salk.* 686.

In the case of goods *waived*; the owner may seize them twenty years after, if the lord of the franchise, nor the king seized before; but if they are seized, then they become forfeited to the king or lord of the liberty. *Kitch.* 82.

And this forfeiture is not like a stray, where tho' the lord may seize, yet the party who is the owner, may re-take them within the year and day; but here the true owner cannot seize his own goods, tho' upon fresh suit within the year and day. 1 *H. H.* 541.

But this is not an absolute loss of the owner's goods, but rather an expedient settled by law, to drive the owner to convict the felon by prosecuting his appeal; and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convicted or attaint, and the fresh suit be inquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 1 H. H.

541.

7. Waifs and strays not claimed within the year and day, are the lord's. *Kitch.* 23, 80, 81. Property accruing to the lord, on not claiming.

For where the lord hath by a year and a day a beast, and it be cried in the church and markets, the property is changed. *Kitch.* 80.

That is to say, after he hath had the beast a year and day from the time of the proclamation, and not from the time of the seizure: for after the first proclamation it becometh an estray, but not sooner. 11 *Mod.* 89.

If the estray within the year estray out of the manor, the lord may chase back the estray unless it be seized by another lord who hath estrays; but if it be seized by such other lord, then the first hath lost all possibility of his gaining the property, and the other lord ought to proclaim it *de novo*. *Finch* 177. *Kitch.* 81. *Hutt.* 67.

Estreit.

1. **E**STREAT (*extractum*) is used for the true copy Estreit, what,
or note of some original writing or record, and especially of fines and amerciaments, imposed in the rolls of a court, to be levied by the bailiff or other officer.

2. The justices and judges before whom fines or amerciaments shall be, shall charge the clerks of the estreats, Making out the estreats.
by their oath to be made, that they make the rolls of such estreats distinctly, by express words, of the cause of the loss, of the term of the year, and the nature of the writ, and betwixt what parties such issues or amerciaments shall be lost, as well in the king's suit, as in the suit of the party. 7 H. 4. c. 3.

3. All clerks of the peace, and town clerks, shall deliver to the sheriff within 20 days after Sep. 29. yearly, a perfect estreat or schedule of all fines, issues, amerciaments, and other forfeitures whatsoever, forfeited in any sessions before *Michaelmas*; on pain of 50 l. half to the king, and half to him that shall sue. 22 & 23 C. 2. c. 22. s. 7, 8. Delivering the same to the sheriff.

4. And

And into the
court of exche-
quer.

4. And shall also yearly, on or before the second *mon-*
day after the morrow of *All Souls*, deliver into the court of
exchequer, a duplicate, certificate, and eftreat of such
eftreats and schedules, so delivered to the sheriff; on the
like pain of 50*l. id. s.* 8. And likewise they may be fur-
ther amerced by the barons of the exchequer. 3 *G. c.* 15.
f. 12.

And upon delivery thereof, they shall take the follow-
ing oath, to be administred by one of the barons :

" You shall swear, that these eftreats now by you de-
livered, are truly and carefully made up and examined,
and that all fines, issues, amerciaments, recognizances,
and forfeitures which were set, lost, imposed, or for-
feited, and in right and due course of law ought to be
eftreated in the court of exchequer, are, to the best of
your knowledge and understanding, therein contained ;
and that in the same eftreats are also contained and ex-
pressed all such fines as have been paid into the court,
from which the said eftreats are made, without any wil-
ful or fraudulent discharge, omission, *mishomer*, or defect
whatsoever: So help you god." 4 & 5 *W. c.* 24. *f.* 5.

Penalty of ma-
king default.

5. And if he shall withhold, or miscertify the same, he
shall forfeit treble ; half to the king, and half to him
that shall sue ; and shall also lose his office, and be incapa-
ble to hold any office in the revenue. 22 & 23 *C. 2.*
c. 22. *f.* 9.

Party coming in
after the eftreat.

6. If recognizances be eftreated into the exchequer,
because not punctually complied with ; yet if the party
appears and takes his trial the next sessions, or otherwise
performs what he was bound to by the recognizance as the
case shall be, he may compound for a very small matter
in the court of exchequer : because the effect, tho' not
the exact form of the recognizance, is complied with.
10 *Mod.* 278.

Process for levy-
ing.

7. Where any fine or forfeiture shall be paid to the
sheriff, clerk of the peace, or other officer, and so certi-
fied into the exchequer ; process shall be awarded to the
sheriff against such person for levying the same. 22 &
23 *C. 2. c.* 22. *f.* 10.

Sheriff's duty in
levying.

8. And in levying, the sheriff shall shew the eftreats
under the seal of the exchequer, to the party indebted ;
on pain of treble damages to the party, and fine to the
king, on conviction before the justices of the peace, or
other justices. 42 *Ed.* 3. *c.* 9.

Eftreats in the
torn.

9. And the sheriff shall make no eftreats to levy his own,
amerciaments (that is to say, in the torn), till two justices
(1 *Q.*) to be named at *Michaelmas* sessions by the *custos ro-*
tulorum,

tulorum, or in his absence by the eldest in the commission, have inspected his books; and the said estreats shall be indented betwixt the said justices and sheriff, and sealed with their seals, the one part to remain with the justices, and the other with the sheriff: And the persons who shall gather the said amerciaments, shall be sworn by the said justices, that they shall take no more than is forfeited, and contained in the said estreats. 11 H. 7. c. 15.

Form of the estreat.

Westmorland. **A**N extract of all the issues, fines, amerciaments and recognizances, set, lost, imposed, and forfeited to our sovereign lord the king, at the general quarter sessions of the peace of our said lord the king, holden at—— in and for the said county of—— on—— the—— day of—— in the—— year of the reign of—— before—— esquires, justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, Joseph Robinson, gentleman, clerk of the peace for the county aforesaid, then and there attending:

Of A. O. late of—— in the said county, labourer, for a trespass and assault at—— aforesaid in the said county, whereof he is indicted and convicted; and his fine set at five shillings, which he paid to the sheriff in court. ——— 1. s. d.
0 5 0

Of A. O. of—— in the said county, yeoman, because he came not now here to answer to such things as against him, on the part of our said lord the king, should be objected, as by a certain recognizance taken before J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, he undertook ——— 10 0 0

Of A. S. of—— in the said county, yeoman, one of the pledges of the said A. O. because he had him not to answer as above ——— 5 0 0

Of B. S. of—— in the said county, yeoman, the other of the pledges of the said A. O. for the like ——— 5 0 0

Evidence.

- I. Of evidence in general.*
- II. Of written Evidence.*
- III. Of the Evidence of witnesses.*
- IV. Of process to cause witnesses to appear.*
- V. Of the manner of giving evidence.*

I. Of evidence in general.

EVIDENCE in legal understanding, doth not only contain matters of record, as letters patents, fines, recoveries, inrollments and the like, and writings under seal, as charters and deeds, and other writings without seal, as court rolls, accounts and the like; but in a larger sense it containeth also the testimony of witnesses, and other proofs to be produced and given, for the finding of any issue joined between the parties. And it is called *evidence*, because thereby the point in issue is to be made evident to the jury. *1 Inst. 283.*

The best evidence is required. 2. It is a general rule in all cases, civil and criminal, that the best evidence that may be had, or that the nature of the thing will bear, is to be given; and it is upon this reason, that a copy of the record is admitted, because one cannot have the record itself; but a copy of a copy will not do. *Law of Evid. 286.*

Presumptive evidence. 3. Many times juries, together with other matter, are much induced by presumptions; whereof there are three sorts, violent, probable, and light or temerary. Violent presumption many times amounts to full proof; as if one be run through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house, with a bloody sword, and no other man was at that time in the house. Probable presumption moveth little. But light or temerary presumption moveth not at all. *1 Inst. 6.*

If all the witnesses to a deed be dead (as no man can keep his witnesses alive, and time weareth out all men) then violent presumption, which stands for a proof, is continual and quiet possession; altho' the deed may receive credit from a comparing of seals, writing, and the like. *1 Inst. 6.*

4. The common law did not require any certain number of witnesses, for the trial of any crime whatsoever. *2 Haw. 428.*

What number of witnesses are required.

And

And before a justice of the peace in divers cases, one witness is sufficient to convict an offender ; the same being directed by special statutes.

But in case of high treason, whereby corruption of blood shall be made, no person shall be attainted, but upon the oaths of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason. 7 *W. c.* 3. *f.* 2.

In like manner, in those courts which proceed by the rules of the civil law, as the spiritual court, and the courts of equity, two witnesses are generally required : And the reason why the civil law requires two witnesses is, because their trial is by witnesses, and not by a jury of twelve men. But where the trial is by verdict of twelve men, there the judgment is not given upon witnesses, or other kind of evidences, but upon the verdict ; and upon such evidence as is given to the jury, they give their verdict. 1 *Inst.* 6. *b.* *Plowd.* 12. *a.*

By 29 *G. 2. c.* 3. *f.* 5. Devises of lands shall be attested by three witnesses at the least.

II. Of written evidence.

1: Acts of parliament relate either to the kingdom in general, and are therefore called *general* acts of parliament ; or only to the concerns of private persons, and are thence called *private* acts of parliament. *Theory of Evid.* 2.

A general act of parliament is taken notice of by the judges and jury, without being shewed ; and hence it is that it hath been said, that the printed statute book is good evidence of general acts of parliament ; not that the printed statutes are the perfect and authentic copies of the records themselves, but every person is supposed to know the law ; and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already. *id.* 2. 8.

But in the case of private acts of parliament, the printed statute book is not evidence, though reduced into the same volume with the general statutes ; but the party ought to have a copy compared with the parliament roll ; for they are not considered as already lodged in the minds of the people. *id.* 8.

However, a private act of parliament, that is in print, which concerns a whole county (as the act of Bedford levels) or a large body of people (as the whole clergy in general), hath been allowed to be given in evidence, without comparing it with the record ; and these things are

the rather admitted, because they gain some authority from being printed by the king's printer; and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. *id.* 8.

Records of
courts.

2. Records of the king's courts prove themselves, and cannot be proved by witnesses. But copies of them must be proved by witnesses, and then they are good evidence. No rasure or interlining shall be intended in them. But the surest way is, to exemplify a record under the great seal, or at least under the seal of the court. 10 Co. 92.

And nothing shall be admitted as evidence of what was done at another trial, till the record of that trial be produced. *Read. Evid.*

Rolls of courts
not of record.

3. There are also other publick matters that are not records, as court rolls, and transactions in chancery; and of these, copies may be given in evidence. *Theory of Evid.* 22, 23.

The reason why the proceedings in chancery are not records is this, because they are not the precedents of justice; for the judgment there is, according to equity and good conscience, and not according to the laws and customs. And the reason why any record is of validity and authority is, because it is a memorial of what is the law of the nation; now chancery proceedings are no memorials of the laws of England, because the chancellor is not bound to proceed according to the laws. *id.* 23.

The rolls of a court baron are evidence; for they are the publick rolls, by which the inheritance of every tenant is preserved; and they are the rolls of the manor court, which was anciently a court of justice relating to all property within the district. *id.* 43.

Depositions.

4. Depositions of witnesses may be read when the witness is dead, but not when the witness is living; for whilst the witness is living, they are not the best evidence the nature of the thing is capable of. *Theory of Evid.* 30.

Yet they may be read when a witness is sought and cannot be found; for then he is in the same circumstances, as to the party that is to use him, as if he were dead. *id.*

So if it is proved that a witness was subpoenaed, and fell sick by the way; for in this case likewise, the deposition is the best evidence that can be had, and that answers what the law requires. *id.*

But a deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross examine the witness; and it is against natural justice, that a man should be concluded by proofs in a cause to which he was not a party. For this reason, depositions in chancery shall not be read

for or against the defendant upon an information or indictment, for the king was no party to the suit. *id.*

Yet this rule admits of some exceptions; as particularly, in all cases where hearsay and reputation are evidence; for undoubtedly what a witness, who is dead, hath sworn in a court of justice, is of more credit than what another person swears he hath heard him say. So a deposition taken in a cause between other parties, will be admitted to be read, to contradict what the same witness swears at a trial. *id.* 30, 31.

It is a general rule, that depositions taken in a court not of record, shall not be allowed in evidence elsewhere. So it hath been holden in regard to depositions in the ecclesiastical court, tho' the witnesses were dead. So where there cannot be a cross examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence. *id.* 33, 34.

But it seems to be settled, that the examination of an informer taken upon oath, and subscribed by him, either before a coroner upon an inquisition of death, or before justices of the peace, in pursuance of the statutes of *Phil. & Mar.* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the satisfaction of the court, that such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the coroner or justice, without any alteration whatsoever. 2 *Haw.* 429.

But it hath been adjudged, that it is not sufficient to authorize the reading of such examination, to make oath that the prosecutors have used all their endeavours to find the witness, but cannot find him. 2 *Haw.* 430.

But it is said to have been adjudged, by the court of king's bench, in the 7 *W.* (1 *Salk.* 281.) upon advice with the justices of the common pleas, on an indictment for a *libel*, that depositions taken before a justice of the peace, relating to the fact, could not be given in evidence, though the deponent were dead; and that the reason why such depositions may be given in evidence in *felony*, depends upon the statutes of *Phil. & Mar.* and that this cannot be extended farther than the particular case of felony. But in the report of this case, 5 *Mod.* 165. it is said, that the reason why such depositions could not be read, was because the defendant was not present when they were taken, and therefore had not the benefit of a cross examination. 2 *Haw.* 430.

Anciently, depositions taken *in perpetuam rei memoriam* were not published till after the death of the witnesses, because they were no evidence while the witnesses were living; but this practice was found very inconvenient, because thereby witnesses became secure in swearing whatever they pleased, inasmuch as they never could be prosecuted for perjury. *Theory of Evid.* 32.

What a man himself, who is living, hath sworn at one trial, can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another on the same inducements; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him, because that shews that what he swears is not from any undue influence. But if a man hath sworn at one trial different from what he hath sworn at another, this is good evidence as to his discredit. *id.* 35.

5. No verdict shall be given in evidence, but between such who were parties or privies to it; because otherwise, a man would be bound by a decision, who had not the liberty to cross examine: and nothing can be more contrary to natural justice, than that any body should be injured by a determination, that he, or those under whom he claims, was not at liberty to controvert. *Theory of Evid.* 18, 19.

And a verdict will not be admitted in evidence, without likewise producing a copy of the judgment founded upon it; because it may happen, that the judgment was arrested upon a new trial granted. But this rule doth not hold, in the case of a verdict on an issue directed out of chancery; because it is not usual to enter up judgment in such case; and the decree of the court of chancery is equally proof that the verdict was satisfactory, and stands in force. *id.* 21.

6. A decree in chancery may be given in evidence between the same parties, or all claiming under them; for their judgments must be of authority in these cases, where the law gives them a jurisdiction: for it would be very absurd, that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof. *Theory of Evid.* 36, 37.

And note, wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter: and in case the determination is final in the court, of which it is a decree, sentence, or judgment, such decree, sentence, or judgment

Verdict.

Sentence or final judgment.

ment will be conclusive in any other court having concurrent jurisdiction. *id.* 37.

7. Upon a trial at bar, a deed was offered in evidence, executed 36 years ago, without proving the hands; which was opposed by the other side; but admitted by the court, who said, there was no fixed rule about it, but that it had often been allowed, where a deed was but 25 or 30 years old. *Vin. Evid. Q. a. 9. E. 11 G. 2. Porter and Gordon.*

8. In cases where writings have been lost by burning of houses, by rebellion, or when robbers have destroyed them, or the like; the law, in such cases of necessity, allows them to be proved by witnesses. *Jenk. 19. Wood b. 4. c. 4.*

If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it; and therefore the defendant having torn his own note signed by him, a copy sworn was admitted to be good evidence to prove it. *L. Raym. 731.*

And it was holden for law, by *Vernon* judge of assize, that where the defendant himself hath the deed which concerns the land in question, and will not produce it; in such a case, the copy thereof will be permitted to be given in evidence; and so it was, and the witness swore it once in his hand, and that the copy produced was a true copy of the deed, and himself did examine it. *Clayt. 15.*

And in such like cases, it is said, that if the party has no copy, he may produce an abstract, nay even give parol evidence of the contents. And where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence without being proved to be true; because in such case it may be impossible to give better evidence. *Theory of Evid. 54.*

Where an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause; sufficient probability must be shewed to satisfy the court, that the original note was genuine, before the copy will be allowed to be read. *Tracy Atk. 446.*

9. An indenture to guide the uses of a common recovery, was offered in evidence, but the seals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm. 402.*

Writing with the seal torn off.

To prove the taking of an oath, in the act of uniformity, a certificate was produced that had only a small piece of wax upon it. By *Twisden*; if it were sealed, tho' the seal was broken off, yet it may be read, as we read recoveries after the seal broken off; and he said, he had seen an administration given in evidence after the seal broken off,

off, and so wills and deeds. 11 *Mod.* 11. *M.* 21 *C.* 2. *Clerk and Heath.*

Letters patent.

10. If upon collateral issue, it is to be proved, that such a one was justice of the peace, baronet, or the like; common reputation is sufficient proof, without shewing the commission, or letters patent of the creation. *Tr. per pais* 347.

Copy of a will.

11. The copy of the probate of a will is good evidence, where the will it self is of chattels; for there the probate is an original taken by authority, and of a publick nature; otherwise, where the will is of things in the realty; because in such case the ecclesiastical courts have no authority to take probates; therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. 3 *Salk.* 154.

For the copy of an original is evidence, wherever the original is evidence, if proved a true copy; but the copy of the probate of a will of lands is no evidence, because the probate in such case is not an original taken by authority, and therefore is only a copy of a copy. *Comb.* 337.

Other copies.

12. So the copy of the court roll of a manor, is good evidence; as also the copy of a church register, the copies of town books, and the like; for where the original itself is good evidence, the immediate copy thereof is also good evidence. *Skin.* 584. *L. Raym.* 154.

And generally, wherever an original is of a publick nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence, as a copy of a bargain and sale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unless the original is lost or destroyed. 3 *Salk.* 154. *H. 8 W. Lynch and Clarke.*

On a warrant to a constable to distrain goods by virtue of an act of parliament; the constable makes distress, and returns the overplus to the offender, but keeps the warrant. Resolved, that a copy of the warrant in this case will be good evidence. 6 *Mod.* 83. *M.* 2 *An. Morley and Staker.*

Inquisition
post mortem.

13. An inquisition *post mortem* is evidence, but not conclusive. 2 *T. Jones.* 224. *M.* 34 *C.* 2. *Earl of Thanet v. Foster.*

Parish register.

14. The entry of the names and titles of persons in a church book either for marriages or births is evidence, but not conclusive evidence of the marriage or birth of any persons, unless the identity of the persons (by such entries intended) is fully proved, and also strengthened with circumstances, as cohabitation, the allowance of the parties themselves, and the like. *Vin. Evid.* (A. b. 15.) 11.

15. Rolls

15. Rolls or ancient books in the heralds office, are Heralds books. evidence to prove a pedigree; but an extract of a pedigree, proved to be taken out of records, shall not; because such extract is not the best evidence in the nature of the thing, as a copy of such records might be had. *Theory of Evid.* 45.

16. An old terrier, or survey of a manor, whether ecclesiastical or temporal, may be given in evidence; for there can be no other way of ascertaining the old tenures or boundaries. *Theory of Evid.* 44.

17. A terrier of glebe is not evidence for the parson, Terrier. unless signed by the churchwardens, as well as the parson; nor then neither, if they be of his nomination: and tho' it be signed by them, yet it seems to deserve very little credit, unless it is likewise signed by the substantial inhabitants. But in all cases, it is certainly strong evidence against the parson. *Theory of Evid.* 45.

18. *M. 11 G. Serle* and lord *Barrington*. The indorsement on a bond by the obligee, of payment of interest, Indorsement of interest on a bond. was allowed to be given in evidence by his administrator, to take off the presumption from the length of time. *L. Raym.* 1371.

19. By the 7 *J. c.* 12. No tradesman nor handicraftsman shall be allowed to give his shop book in evidence, Shop book. on an action for money due for wares delivered, or for work done, above one year before the action brought. But this not to extend to any trading between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for any thing directly falling within the compass of their mutual trades and merchandize.

In the case of *Pitman* and *Maldox*, 11 *W.* A shop book was allowed for evidence, it being proved that the servant that writ the book was dead, and this was his hand, and he accustomed to make the entries, and no proof was required of the delivery of the goods; and *Holt Ch. J.* said it was as good evidence as the proof of a witness's hand to an obligation; and he held, that tho' the statute of the 7 *J.* says, a shop book shall not be evidence after the year, yet it is not of itself evidence within the year. 2 *Salk.* 690.

20. A man's book of accounts is no evidence for the owner of the book, but for the adverse party; for his book cannot be of better credit than his oath, which would not serve in his own case. *Tr. per pais* 348. Book of accounts.

21. In the case of the *Queen* and *Mead*, the defendant, Private book of entries. and eight others, were incorporated under an act made 30 *El.* by the name of the surveyors of the highways at *Albington* in the county of *Bucks.* and were trustees of a charity

rity called *Bedford's gift*. An information was preferred against the defendant, for executing this office, being an office of trust, without having taken the oaths, contrary to the 25 C. 2. c. 2. To which he pleaded not guilty. And now it was moved for a rule, that the prosecutor might have two books produced, which these surveyors kept, in which they entred their elections, and also their receipts and disbursements; and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial. But it was denied by the court; because they are perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution. *L. Raym.* 927.

Inscription on a grave stone.

22. A copy of an inscription on a grave stone, hath been allowed to be given in evidence.

Almanack.

23. The examination of an almanack, that such a day of the month was Sunday, was ruled to be sufficient; and that a trial of this by a jury is not necessary, altho' it is a matter of fact. *Cro. Eliz.* 227.

And the reason why the kalendar in an almanack is allowed as evidence seemeth to be, because the said kalendar is part of the book of common prayer, which is established by act of parliament.

Father's entry of the child's birth.

24. And an almanack wherein the father had writ the day of the nativity of his son, was allowed as evidence to prove the nonage of his son. *Raym.* 84.

General history.

25. *Camden's Britannia* was offered in evidence, to prove a particular custom, but refused; for the court held, that a general history might be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it; but not to prove a particular right or custom: So in the case of *St. Katherine's hospital*, *Hale Ch. J.* allowed a chronicle to be evidence of a particular point of history in *Edward the third's* time: So a year book may be evidence to prove the course of the court. And in this case it was admitted, that heralds books are good evidence as to pedigrees, and parish registers as to births and marriages, upon the nature of the thing. But in the exchequer, the question being whether the *Abbey de Fentibus* was an inferior abbey or not, *Dugdale's Monasticon* was refused for evidence, because the original records might be had in the augmentation office. *1 Salk.* 281. *7 IV. Stainer and the Burgesses of Droitwich.*

So in the case of *Cockman and Mather*, *E. 13 G.* On a trial at bar, concerning the right of visiting university college in *Oxford*, one of the issues was, whether king *Alfred* was founder. And the counsel for the plaintiff would

would have given in evidence several historians as to this point. But the chief justice declared, that such evidence is never admitted, unless in proof of a point concerning the publick government. And the evidence was not allowed. *Barnard.* 14.

26. It seems to have been generally holden, since the reversal of the attainder of *Algernon Sidney*, that similitude of hands is not evidence in any criminal case, whether capital or not capital. 2 *Haw.* 431. *L. Raym.* 39. Similitude of hands.

And, generally, it is said, that similitude of hands is no evidence; but saying that he was well acquainted with his writing, and knew it to be the party's, is evidence. *Vin. Evid.* (T. b. 48.) 14.

And in general cases, the witness should have gained his knowledge from having seen the party write; but under some circumstances that is not necessary: as where the hand writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence, would be admitted to prove it, tho' he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write; as where a parson's book was produced to prove a modus, the parson having been long dead, a witness who had examined the parish books, in which was the same person's name, was permitted to swear to the similitude of the hand writing, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce. *Theory of Evid.* 25, 26.

III. Of the Evidence of witnesses.

1. It seems that the confession of the defendant, whether taken on an examination before justices of the peace, in pursuance of the 1 & 2 *P. & M. c.* 13. or 2 & 3 *P. & M. c.* 10. upon a bailment or commitment for felony, or taken by the common law upon an examination for other crimes not within those statutes, or in discourse with private persons, hath always been allowed to be given in evidence, against the party confessing, but not against others. Confessions;
2 *Haw.* 429.

But wherever a man's confession is made use of against him, it must be all taken together, and not by parcels; 1 *Haw.* 429.

2. It is to be observed, that there be many circumstances that disable a juror, that are not sufficient exceptions against a witness: Thus the exception of kindred is a good cause of challenge against a juror, but not against a witness; Witness of kin to the party.

ness; therefore the father may be a competent witness for or against his son, or the son for or against his father. These and the like exceptions may be to the credit or credibility of the witness, but are not exceptions against his competency. 2 *H. H.* 276.

For, that I may observe it once for all, the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony is left to the jury. 2. Exceptions to the competency of the witness, which do exclude him from giving his testimony, and of these exceptions the court is the judge. 2 *H. H.* 276, 277.

3. It seems agreed, that an attainder, judgment, or conviction of treason, felony, piracy, præmunire, perjury, or forgery on 5 *El.* and also a judgment in attain for giving a false verdict, or in conspiracy at the suit of the king; and also judgment for any heinous crime to stand in the pillory, or to be whipped or branded, are good causes of exception against a witness, while they continue in force. 2 *Haw.* 432. *Theory of Evid.* 107.

But it is agreed, that no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court. 2 *Haw.* 433.

Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. 2 *Haw.* 433.

And a man shall not be permitted to swear, that he was suborned and perjured. *St. Tr. V.* 3. 427.

And lord *Coke* says, a witness alledging his own infamy or turpitude, is not to be heard. 4 *Inst.* 279.

Thus a wife was disallowed to be a witness to prove her husband had no access to her in a case of bastardy. *Sess. Cases. V.* 2. 175. *K. and Reading. M.* 8 G. 2.

It seems clear at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror. 2 *Haw.* 433.

A person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witness. 2 *Haw.* 433.

And it seems agreed, that the king's pardon of treason, or felony, after a conviction or attainder restores the party to his credit. 2 *Haw.* 433.

4. It seems agreed to be a good exception, that a witness is an infidel; that is, as it seemeth, that he believes neither the old nor new testament to be the word of god, on one of which our laws require the oath should be administered. 2 *Haw.* 434. But Mahometans and Pagans have been admitted to be sworn in their own country way.

5. Want of discretion is a good exception against a witness; on which account alone it seems, that an infant may be excepted against. 2 *Haw.* 434. Witness an infidel.
Witness wanting discretion.

But if an infant be of the age of 14 years, he is as to this purpose of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear, that he hath a competent discretion, he may be sworn. 2 *H. H.* 278.

And in many cases an infant of tender years may be examined, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practised upon children. 2 *H. H.* 279, 284.

But in no case shall an infant be admitted as evidence without oath. *Str.* 700. *Tracy Atk.* 29.

6. It seems an uncontested rule in all cases, that it is a good exception against a witness that he is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. 2 *Haw.* 433. Witness interested.

Thus in an information upon the statute of usury, the party to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be witness in his own cause, and should avoid his own bonds and assurances, and discharge himself of the money borrowed. 1 *Inst.* 6.

Thus also an attorney ought not to be examined against his client, because he is obliged to keep his secrets: but of his own knowledge before retainer, he may be examined as a witness, if served with a subpoena. *Wood. b. 4. c. 4.*

But upon an indictment for battery, or the like, the party grieved may be a witness against the defendant, because the prosecution is at the suit of the king. *Wood. b. 4. c. 5.*

And in many criminal cases, from the necessity of the thing, interested persons are allowed as witnesses. As where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest; for he will be intitled to restitution: and yet his evidence is admitted. So in removing an indictment by certiorari from the sessions to the king's bench; tho' the prosecutor in that case, if the defendant

defendant be convicted, is intitled to his costs, yet he is allowed as a witness. So where a man, in case of conviction of the offender for a robbery, will be intitled to a 40l. reward; yet his evidence shall be received. And by *Parker* chief justice: As to the cases where a 40l. reward is given, they admit of this answer; that the intention of those acts would be quite defeated, if so be the reward should take off the evidence. The same answer may serve to the cases put upon an indictment of felony for stolen goods; and where the indictment is removed by certiorari: for none in the first case but the owner can prove the property of the goods; and in the second, if the giving of costs should take off the evidence of the prosecutor, the act of parliament designed to discountenance the removing of suits by certiorari, would give the greatest encouragement to them that is possible. 10 *Mod.* 193. *M.* 12 *An. 2.* and *Muscott*.

Also it seems agreed, that it is no good exception against a witness, that he has a maintenance from the king; for every one may maintain his own witnesses. 2 *Haw.* 434.

Thus also, one commoner may be a witness for another claiming common, because in effect it charges himself; that is to say, he admits another to have common with himself. But if the prescription be, that all the inhabitants of such a place ought to have common there, one of the inhabitants cannot be a witness, to prove that another of the said inhabitants ought to have common there, because in effect he would swear to give himself right of common there. *L. Raym.* 731.

A trustee may be a witness, if he hath released his trust; but not if he hath conveyed it over. *Sid.* 315. *M.* 18 *C.* 2. *Stevens* and *Gerrard*.

An heir at law may be a witness concerning the title to the land, but the remainder man cannot, for he hath a present interest, but the heirship is a mere contingency. 1 *Salk.* 283. *M.* 10 *W. Smith* and *Blackham*.

In evidence to a jury at bar, a special issue by rule of court was directed to try the custom of lady *Percie's* manor of *Westwood* in *Cumberland*, whether fines on the tenants on their lord's death, be due to the heirs or successors of the lord, during his minority; the defendant excepted to the steward, because he had a fee on admission, but it was not allowed, and he was sworn. 3 *Keb.* 90.

A witness's laying a wager in the cause, is no hindrance to his being a witness; for the other has an interest in his evidence which he cannot deprive him of. *Fryth.* 31. *Str.* 652.

If a person apprehends himself to be interested, tho' in strictness of law he is not, yet he ought not to be sworn: as where the witness for the plaintiff apprehended that if the plaintiff should recover, he would remit a claim of some money which he (the plaintiff) had upon this witness; but if he should not recover, he would not remit it; although in strictness of law, his recovering or not recovering in that case would not alter the claim: or as in case where the witness owned himself to be under an honorary, though not under a binding engagement, to pay the costs. *Str.* 129.

7. It seems agreed, that the husband and wife being as one and the same person in affection and interest, can no more give evidence for one another, in any case whatsoever, than for themselves; and that regularly the one shall not be admitted to give evidence against the other, nor the examination of the one be made use of against the other, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case. Yet some exceptions have been allowed in cases of evident necessity; as in the lord *Audley's* case, who held his wife, while his servant by his command ravished her; or where a man is indicted for a forcible marriage 'on the statute of the 3 *H.* 7. or where either a husband or wife have cause to demand sureties of the peace against the other. 2 *Haw.* 431, 432.

8. It seems agreed, that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him. *2 Haw.* 432.

But where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. *Bac. Abr. Evid. A. 2.*

9. It hath been long settled, that it is no exception against a witness, that he hath confessed himself guilty of the same crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders. 2 *Haw.* 432.

Also it hath been often ruled, that accomplices who are indicted, are good witnesses for the king, until they be convicted. 2 *Haw.* 432.

Also it hath been often adjudged, that such of the defendants in an information, against whom no evidence is given, may be witnesses for the others. 2 *Haw.* 432.

It

It hath been also adjudged, that where three persons are sued in three several actions on the statute for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another. 2 *Haw.* 432.

Witness an alien or bondman. 10. It seems agreed, that it is no good exception against a witness, that he is an alien, or villein, or bondman. 2 *Haw.* 434.

Witness blind. 11. There were two witnesses to a deed, and one of them was blind. It was ruled by *Holt* chief justice, that such deed might be proved by the other witness, and read; or might be proved without proving that this blind witness is dead; or without having him at the trial, proving only his hand. *L. Raym.* 734. *Wood and Drury.* Warwick assiz. 1699.

Witness over sea. 12. If a witness is beyond the sea, it is usual to prove his hand, and that he is beyond the sea. *Vin. Evid.* [T. b. 48.] 13.

Witness become insane. 13. There were two witnesses to a bond; one in *Africa*; and the other in *Bedlam*, mad: On an order to prove an exhibit *viva voce* in chancery, a witness proved these facts, and their hands to the bond as if dead. *T. 5 & 6 G. 2.* *Vin. Evid.* [T. b. 48.] 12.

Witness dead. 14. If a witness to a deed is dead; it is sufficient to prove the witness's hand, without proving the hand of the party. By *Pratt* chief justice, *T. Vac.* 1719. *Vin. Evid.* [T. b. 48.] 10.

The sayings of a dead man are not to be given in evidence to prove a particular fact; they are only to be admitted in proof of general usages and customs; but as for a particular fact, lying in the knowledge of a particular person, by his death the evidence is lost. *St. Tr. V.* 5. 456.

And it hath been agreed, that the evidence given by a witness at one trial, cannot in the ordinary course of justice be made use of against a defendant, on the death of such witness at another trial. 2 *Haw.* 430.

In the case of murder, what the deceased declared after the wound given, may be given in evidence. *Vin. Evid.* [A. b. 38.] 11.

But where such declaration is reduced into writing, the writing itself must be produced, and not evidence thereof given *viva voce.* *id.* 12.

Hearsay.

15. It is a general rule that hearsay is no evidence; for no evidence is to be admitted but what is upon oath; and if the first speech was without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice; and besides, the adverse party had no opportunity of a cross examination;

examination ; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit. But tho' hearsay ought not to be allowed as direct evidence, yet it may be allowed in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. So where the issue is on the legitimacy of a person, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married, for the presumption arising from the cohabitation is either strengthened or destroyed by such declarations, which altho' not to be given in evidence directly, yet they may be assigned by the witness as a reason for his belief one way or other. So hearsay is good evidence to prove who was a man's grandfather, when he married, what children he had, and the like, of which it is not reasonable to presume that there is better evidence. So to prove that a man's father or other kinsman beyond the sea is dead, the common reputation and belief of it in the family gives credit to such evidence ; and for a stranger it would be good evidence, if a person swore that a brother or other near relation had told him so, which relation is dead. So in questions of prescription, it is allowable to give hearsay evidence, in order to prove general reputation : and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. *Theory of Evid.* 111, 112.

IV. Of process to cause witnesses to appear.

1. The compulsory means to bring in witnesses, are of two kinds. 1. By process of *subpoena* (A) issued in the king's name, by the justices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal cases), the justices that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial, bind over (B) the witnesses to appear at the sessions, and in case of their refusal either to come, or to be bound over, may commit them for their contempt in such refusal. 2 *H. H.* 282.

2. But that which is a great defect in this part of judicial administration, is, that there is no power to allow witnesses their charges in criminal cases ; whereby many times poor persons grow weary of attendance, or bear their

Two ways of causing witnesses to appear.

Charge of witnesses.

their own charges therein, to their great hindrance and loss. 2 H. H. 282.

That is to say, unless it be in the case of grand or petit larceny, or other felony; for in such cases, by the statute of the 25 G. 2. c. 36. reasonable charges shall be allowed by the court to the prosecutor upon conviction, to be paid by the treasurer out of the county rate.

And by the statute of the 27 G. 2. c. 3. When any poor person shall appear on recognizance in any court to give evidence against another accused of grand or petit larceny or other felony, the court may, at the prayer, and on the oath of such person, and on consideration of his circumstances, order the treasurer to pay him such sum as they shall think reasonable for his time, trouble, and expence; which order the proper officer shall make out for the fee of 6d. except in *Middlesex*, where the same shall be paid by the overseers of the poor where the person was apprehended.

Where a witness is a prisoner in execution.

3. Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum*, to give his evidence. *St. Tr. V. 2. 580. V. 4. 37.*

Witness how far privileged against an arrest.

4. One was subpœnaed *ad testificandum*, and prayed a privilege from being arrested, which was granted; and by the court, it will supersede an arrest upon mean process, but not upon an execution; yet the sheriff in that case may be committed for his contempt. *Nevil's case, 15 G. 2. Tr. per p. 310.*

Penalty of a witness not appearing.

5. By the 5 El. c. 9. s. 12. If any person upon whom any process out of any of the courts of record within this realm shall be served, to testify or depose concerning any matter depending therein, and having tendred unto him, according to his countenance or calling, such reasonable sum for his costs and charges, as (having regard to the distance of the places) is necessary to be allowed in that behalf, do not appear according to the tenor of the process, having not a lawful and reasonable impediment; he shall forfeit 10l. and shall yield such further recompence to the party grieved, as to the judge of the court, out of which the process was awarded shall seem meet, according to the loss that the party which procured the process shall sustain; to be recovered by the party grieved, in any court of record.

In the case of *Wyat and Winkford, 2 G. 2.* A motion was made for an attachment against a person for not attending at the assizes to give his evidence, being subpœnaed, and having received one guinea for his charges, and being promised to have one guinea a day while there, and his charges paid. And a rule was made to shew cause. And afterwards cause was shewed, that an attachment ought not to

go, but the party injured had his action upon the statute of *Eliz.* but the court thought, that it was a good foundation for an attachment, the disobedience to the subpoena being a contempt to the court; and tho' an action might be brought on the statute, yet that was a more dilatory method, and more difficult to proceed in, which encouraged witnesses not attending frequently upon trials, at which they were subpoenaed to appear and give evidence. And therefore the rule was made absolute. *L. Raym.* 1529.

In the case of *Small and Whitmill*, *M.* 10 G. 2. it was moved for an attachment against a witness, for not attending a trial at the sittings. But it appearing that the witness was not personally served with the subpoena ticket (it being delivered to his servant, who said he would carry it to him, and going away, came again and said he had done so); and it appearing that one shilling only was left with the ticket, which the court did not deem a sufficient tender for his expences; the attachment was denied.

E. 14 G. 2. *Chapman and Poynton*. A witness was served with a subpoena at *Chester*, to attend the sittings at *Guildhall*, and two guineas were tendred by the person who served it, and being objected to as too little, he declared he would give no more. The witness not coming up, an attachment was moved for; but on shewing cause was discharged: the court saying it was too little, and that the witness is not obliged to trust to the court's allowing him more when he comes to the book; for perhaps the party may not call him, and then it may be difficult for him to get home again: that this way of punishing as for a contempt was new, and practised only in this court: the common pleas not doing it to this day, but leaving the party to his remedy on the 5 *El. c. 9.* and therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the question, whether the non-attendance was thro' obstinacy or not. *Str.* 1150.

And, by the court, in the case of *Hammond and Stewart*, *H.* 8 G. the witnesses ought to have a reasonable time to put their affairs in order, that their attendance upon the court may be as little prejudice to themselves as possible. *Str.* 510.

In criminal cases, if a witness hath been bound over, and do not appear; he shall forfeit his recognizance.

V. Of the manner of giving Evidence.

1. He who affirms the matter in issue, whether plaintiff or defendant, ought to begin to give evidence. *Litt.* 36. which party shall begin the evidence.
2. The

Evidence to be upon oath.

2. The evidence both for and against a prisoner, ought to be upon oath.

And if a peer is produced as a witness he ought to be sworn. 3 *Keb.* 61.

Lord *Preston* was committed by the court of quarter sessions, for refusing to be sworn to give evidence to the grand jury on an indictment of high treason; and on his being brought by *habeas corpus* into the king's bench, *Holt* Ch. J. said, it was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed. 1 *Salk.* 278.

But a quaker's affirmation in all cases not being criminal, shall be allowed as evidence, without an oath; but in criminal cases his affirmation shall not be allowed. 7 & 8 *W. c.* 34.

Must be positive.

3. It is no satisfaction for a witness to say, that he thinks or persuades himself; and this for two reasons, by *Coke* chief justice: 1. Because the judge is to give absolute sentence, and ought to have more ground than thinking. 2. Because judges, as judges, are always to give judgment *secundum allegata et probata*, notwithstanding that private persons think otherwise. *Dyer* 53.

Witnesses may be examined apart.

4. The court may indulge a prisoner in examining the witnesses apart, but he cannot demand it of right. *St. Tr. V.* 4. 9.

Evidence to be given in the prisoner's presence.

5. In cases of life, no evidence is to be given against a prisoner, but in his presence. 2 *Haw.* 428.

Witnesses cannot testify a negative.

6. In every issue, the affirmative is to be proved. A negative cannot regularly be proved; and therefore it is sufficient to deny what is affirmed, until it be proved; but when the affirmative is proved, the other side may contest it with opposite proofs; for this is not properly the proof of a negative, but the proof of some proposition totally inconsistent with what is affirmed: as if the defendant be charged with a trespass, he need only make a general denial of the fact, and if the fact be proved, then he may prove a proposition inconsistent with the charge, as that he was at another place at the time, or the like. *Theory of Evid.* 116, 117.

But to this rule there is an exception of such cases, where the law presumes the affirmative contained in the issue. Therefore, in an information against lord *Halifax* for refusing to deliver up the rolls of the auditor of the exchequer; the court of exchequer put the plaintiff upon proving the negative, namely, that he did not deliver them; for a person shall be presumed duly to execute his office, till the contrary appear. *id.* 117.

A man shall not disprove his own witnesses.

7. A prisoner may not call witnesses to disprove what his own witnesses have sworn. *St. Tr. V.* 2. 764, 792.

8. A

8. A witness shall not be permitted to read his evidence, Whether a witness may read his evidence. but he may look upon his notes to refresh his memory. *St. Tr. V. 4. 45.*

9. A witness shall not be cross examined, till he has When he may be cross examined. gone thro' the evidence for the party on whose side he was produced. *St. Tr. V. 2. 792.*

10. It hath been admitted, that in order to shew a vari- Variance, ance in the evidence, a deposition taken by a witness before a justice of the peace, may at the prisoner's desire be read at the trial, in order to take off the credit of the witness, by shewing a variance between such depositions, and the evidence given in court. And for the same reason it seems agreed, that where a witness at one trial varies from his own evidence at another, in relation to the same matter, such variance may also be given in evidence to invalidate his testimony at the second trial. *2 Hawk. 430.*

11. The counsel of that party which doth begin to main- Which party shall conclude. tain the issue, ought to conclude. *Tri. p. pais 220.*

A. Subpœna to give evidence.

GEORGE the third, by the grace of god, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To A. B. C. D. and E. F. greeting : We command you, and every of you, that all business being laid aside, and all excuses whatsoever ceasing, you do in your proper persons appear before our justices assigned to keep the peace in our county of——and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the general quarter sessions of the peace, to be holden at——in and for the said county, on——the——day of——at the hour of ten in the forenoon of the same day, to testify the truth, and give evidence on behalf of the inhabitants of the parish of——in the said county, against A. O. in a case of bastardy. And this you are in no wise to omit, nor any of you to omit, on pain of one hundred pounds. Witness Sir James Lowther, baronet, the——day of——in the——year of our reign.

C.

Note ; There may be four witnesses put in one *subpœna*.

A subpœna ticket.

To Mr. A. W.

BY virtue of his majesty's writ of subpœna to you directed, and herewith shewn to you, you are personally to be before his majesty's justices of the peace for the county of——at the general

general quarter sessions of the peace to be holden for the said county, at——in the said county, on——the——day of——next, to testify the truth, and give evidence on behalf of the inhabitants of the parish of——in the said county, against A. O. in a case of bastardy. And this you are not to omit, upon pain of one hundred pounds. Dated this——day of——1763.

By the court.

C.

B. Condition of a recognizance to appear and give evidence.

THE condition of this recognizance is such, that if the above-bound A. W. shall personally appear at the next general quarter sessions of the peace to be holden at——in and for the said county, and then and there give such evidence as he knoweth, upon a bill of indictment to be exhibited by A. I. of——yeoman, to the grand jury, against A. O. late of——in the said county, yeoman, for the feloniously taking and carrying away——the property of——and in case the said bill be found a true bill, then if the said A. W. shall then and there give evidence to the jurors that shall pass on the trial of the said A. O. upon the said bill of indictment, and not depart thence without leave of the court, then this recognizance to be void, otherwise of force.

Examination.

IF a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty; yet the justice shall not discharge him, but he must either be bailed or committed: for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial *Dalt. c. 164.*

In order to which bail or commitment, the examination and information of the parties must first be taken, according to the following statutes:

Two or more justices (1 Q.) or one of the said justices, before they bail a person apprehended for felony (if the offence is bailable) shall take his examination (A) and the information (B) of

(B) of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing; which examination they shall certify (together with the bailment) at the next general gaol delivery, to be holden within the limits of their commission. 1 & 2 P. & M. c. 13. s. 4.

And they shall have power to bind by recognizance (C) all such as do declare any thing material to prove the offence, to appear at the next general gaol delivery, to be holden within the county where the trial shall be, then and there to give evidence against the party; and shall certify such recognizance in like manner. s. 5.

And if they offend in any thing herein, they shall be fined by the justices of gaol delivery. id.

In like manner, where the person is not bailed, but committed to ward, the justice or justices who commit him, shall before such commitment, take the like examination and information, and shall put the same in writing within two days after the said examination, and shall in like manner bind over the witnesses; and certify the whole as above. 2 & 3 P. & M. c. 10.

Shall take his examination] And in order thereunto, if by some reasonable occasion, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice, for further examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. 1 H. H. 585.

But the time of the detainer must be no longer than is necessary for such purpose; for which it is said, that the space of three days is a reasonable time. 2 Haw. 119.

But the examination of the person accused, ought not to be upon oath. 1 H. H. 585.

But if upon his examination he shall confess the matter, it shall not be amiss that he subscribe his name, or mark to it. Dalt. c. 164.

Which examination being voluntary, and sworn by the justice or his clerk to be truly taken, may be given in evidence against the party confessing, but not against others. 1 H. H. 585. 2 Haw. 429.

Information of them that bring him] Or of other witnesses; whom the justice may bring before him by his warrant (D) for that purpose. 1 H. H. 586. Dalt. c. 164.

And

And this information must be upon oath. *Dalt. c. 164.*
 1 *H. H. 586.*

And therefore if a quaker is witness, his affirmation must not be taken in this case; for by the 7 & 8 *W. c. 34. s. 36.* it is provided, that no quaker shall be examined for or against any person in any criminal cause, unless it be upon oath.

And the said information being upon the trial sworn to be truly taken, by the justice or his clerk, may be given in evidence against the prisoner, if the witnesses be dead and not able to travel. 1 *H. H. 586.*

Or as much thereof as shall be material to prove the felony] Yet it seemeth also just and right, that the justices who take information against a felon, or person suspected of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as maketh against the prisoner: for such information, evidence, or proof so taken, is only to inform the king and his justices of the truth of the matter. *Dalt. c. 165.*

Shall certify at the next gaol delivery] And yet for petty larcenies, and small felonies, the offenders may be tried at the quarter sessions, and the examinations and informations may be certified thither. *Dalt. c. 164.*

To be holden within the limits of their commission] And yet examinations taken by justices of the peace in one county, may be by them certified in another county, and there read, and given in evidence against the prisoner. *Dalt. c. 164.*

To bind by recognizance] And upon refusal may commit the person refusing. 1 *H. H. 586.*

And the parties grieved ought to be bound, not only to give evidence, but also to prefer a bill of indictment against the prisoner. *Dalt. c. 164.*

A. Examination of a felon.

Westmorland. **T**HE examination of A. O. of——
 yeoman, taken before me Henry Chay-
 tor, clerk, one of his majesty's justices of the peace for the said
 county [or, in the case of bail,—taken before us—two of
 his majesty's justices of the peace for the said county, and one of
 us of the quorum] the——day of——in the——year of
 the reign of——

The

The said A. O. being charged before me [or, us] by A. I. of——yeoman, with the felonious stealing out of the house of the said A. I. at——on the——day of——the following goods, to wit——to the value of——he the said A. O. upon his examination now taken before me [or us] confesseth that——[or, denieth that——] &c.

B. Information of a witness.

Westmorland. **T**H E information of A. I. of——yeoman, taken upon oath before me [as before]

C. Recognizance to give evidence.

Westmorland. } **B**E it remembered, that on the——day of——in the——year of the reign of——A. I. of——in the said county, yeoman, did come before me Henry Chaytor, clerk, one of the justices of our said lord the king, assigned to keep the peace in the said county, and did acknowledge himself to owe to our said lord the king ten pounds of lawful money of Great Britain, under condition, that if he shall personally appear before the justices of our said lord the king, at the next general quarter sessions of the peace [or, gaol delivery] to be holden in and for the said county, then and there to give evidence in behalf of our said lord the king, against A. O. late of——who being attached, and suspected of felony, is now committed to the gaol of our said lord the king in the said county, then this recognizance to be void, otherwise of force.

Or thus, to prefer a bill of indictment, and give evidence.

Westmorland. **B**E it remembered, that on the——day of——in the——year of the reign of——A. I. of——in the said county yeoman, personally came before me Henry Chaytor, clerk, one of the justices of our said lord the king, assigned to keep the peace in the said county, and acknowledged himself to owe to our said lord the king, the sum of——of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, if he the said A. I. shall fail in the condition indorsed.

H. C.

The condition of the within written recognizance is such, that whereas one A. O. late of———was this present day brought before the justice within mentioned by the within bounden A. I. and was by him charged with the felonious taking and carrying away———of the goods of him the said A. I. and thereupon was committed by the said justice to the common gaol in and for the said county: If therefore he the said A. I. shall and do at the next general quarter sessions of the peace [or, gaol delivery] to be holden in and for the said county, prefer or cause to be preferred, one bill of indictment of the said felony against the said A. O. and shall then also give evidence there concerning the same, as well to the jurors that shall then inquire of the said felony, as also to them that shall pass upon the trial of the said A. O. that then the said recognizance to be void, or else to stand in full force for the king.

D. Warrant for a witness.

Westmorland. { To the constable of———

WHEREAS oath hath been made before me——— one of his majesty's justices of the peace in and for the said county, by A. I. of———yeoman, that he the said A. I. was lately robbed at———and that he hath good cause to believe that A. W. of———is a material witness to prove by whom the said robbery was committed: These are therefore to require you to cause the said A. I. forthwith to come before me, to give such information and evidence as he knoweth concerning the said offence, that such further proceeding may be had therein, as to the law doth appertain. Given under my hand and seal at———in the said county, the———day of———.

Here endeth the FIRST VOLUME.

